IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:
The Hon'ble Justice Harish Tandon,
And
The Hon'ble Justice Soumen Sen,
And
The Hon'ble Justice Kausik Chanda

WPA 9921 of 2007
CAN 1 of 2009 (Old No. CAN 4639 of 2009)

With
APO 343 of 2013

With
WPA 303 of 2023
Utpal Kanti Karan
Vs.
State of West Bengal & Ors.

With
FMA 125 of 2022

The State of West Bengal & Ors.
Vs.
Manash Kumar Gorai & Anr.

With
FMA 143 of 2022
CAN 1 of 2021
CAN 2 of 2021

The State of West Bengal & Anr.
Vs.
Archana Pramanick & Ors.

With
FMA 2688 of 2007
Nirmalendu Maity
Vs.
State of West Bengal & Ors.

With
F.M.A. 387 of 2020

State of West Bengal & Ors.
Vs.
Bisweswar Bera & Anr.

With
F.M.A. 557 of 2007
Baishali Banerjee
Vs.
State of West Bengal & Ors.

With
F.M.A. 583 of 2006
State of West Bengal & Ors.
Vs.
Md. Shohidullah

With
F.M.A. 584 of 2006
State of West Bengal & Ors.
Vs.
Shyamsundar Mohanto

With
F.M.A. 585 of 2006
State of West Bengal & Ors.
Vs.
Nirupama Bairagi

With
M.A.T. 421 of 2022
CAN 1 of 2022
Sagar Kumar Das
Vs.
State of West Bengal & Ors.

With
WPA 10273 of 2016
Satya Deo Prasad
Vs.
Government of West Bengal & Ors.

With
WPA 12414 of 2008
Smt. Rinku Sarkar
Vs.
State of West Bengal & Ors.

With

WPA 12419 of 2008
Srijit Pal
Vs.
State of West Bengal & Ors.

With
WPA 12420 of 2008
Subimal Sinha
Vs.
State of West Bengal & Ors.

With
WPA 13060 of 2004
Shyamsundar Mohanto
Vs.
State of West Bengal & Ors.

With
WPA 14890 of 2001
Baby Gopex
Vs.
State of West Bengal & Ors.

With
WPA 15736 of 2013
Atasi Sikdar
Vs.
State of West Bengal & Ors.

With
WPA 16707 of 2004
Nirupama Bairagi
Vs.
State of West Bengal & Ors.

With
WPA 2364 of 2007
CAN 1 of 2009 (Old No. CAN 7088 of 2009)
Md. Abdus Sattar
Vs.
State of West Bengal & Ors.

With
WPA 26423 of 2007
Bimal Chandra Jana
Vs.
State of West Bengal & Ors.

With
WPA 29710 of 2013
Pampa Das
Vs.
State of West Bengal & Ors.

With
WPA 4698 of 2016
Subodh Kumar Biswas
Vs.
State of West Bengal & Ors.

For the Appellant In (FMA.2688 of 2007)	: Mr. Sridhar Chandra Bagari, Adv.
For the appellant In (FMA 557 of 2007),	: Mr. Biswarup Biswas, Adv., Mr. Gora Chand Samanta, Adv.
For the Appellant In (MAT 421 of 2022)	:Mr. N.I Khan, Adv., Mr. Amlan Kumar Mukherjee, Adv.
For the respondents in (FMA 125 of 2022) in (FMA143 of 2022)	:Mr. Subir Sanyal, Adv., Mr. Sakti Pada Jana, Adv., Mr. Dwarik Nath Mukherjee, Adv., Mr. Kamal Mishra, Adv., Mr. Subhajyoti Das, Adv.
For the appellant in (FMA 125 of 2022)	: Mr. Anirban Ray, Adv., Mr. Himadri Sekhar Chakraborty, Adv., Ms. Sucharita Paul, Adv.
For the appellant In (FMA 143 of 2022)	:Mr. Swapan Kumar Dutta, Adv., Mr. Dipankar Dasgupta, Adv.
For the petitioner In (WPA 4698 of 2016)	:Mr. Samaresh Chandra Dhara, Adv.
For the petitioner In (WPA 15736 of 2013)	:Mr. Mahananda Roy, Adv.
For the petitioner In (WPA 29710 of 2013)	: Ms. Lina Majumder, Adv.
For the Petitioner In (WPA 4698 of 2016)	:Mr. Supriyo Chattopadhyay, Adv., Mr. Samaresh Chandra Dhara, Adv.

For the respondent no. 1 In (FMA 387 of 2020)	:Mr. Kamalesh Bhattacharyya, Adv., Mr. Surendra Kumar Sharma, Adv.
For the respondent no. 5 In (MAT 421 of 2022)	:Mr. Tarun Kumar Das, Adv.
For the petitioner In (WPA 4698 of 2016)	: Mr. Piush Chaturvedi, Adv., Mr. Supriyo Chattopadhyay, Adv., Mr. Samaresh Chandra Dhara, Adv.
For the State	: Mr. S.N. Mookerji, Ld. A.G, Adv., Mr. Tapan Kumar Mukherjee, Adv., Mr. Swapan Kumar Dutta, Adv., Mr. Tapas Kumar Mukherjee, Adv., Mr. Supriya Chattopadhyay, Adv., Ms. Iti Dutta, Adv., Mr. Pinaki Dhole, Adv., Mr. Arjun Roy Mukherjee, Adv., Mr. Biswajit De, Adv., Mr. Rajlakshmi Ghatak, Adv., Mr. Debdooti Dutta, Adv., Ms. Saheli Mukherjee, Adv., Ms. Kakali Smajpaty, Adv., Mr. Paritosh Sinha, Adv., Mr. Dipankar Dasgupta, Adv., Ms. Sucharita Paul, Adv., Ms. Lina Majumdar, Adv., Ms. Pampa Das, Adv., Mr. Somnath Naskar, Adv.,
Hearing Concluded On	: 21st December, 2023
Judgment On	: 7th February, 2024

1. ***Soumen Sen, J.:-*** The present reference is arising out of an order dated 22nd August, 2008 passed by the Division Bench of this Court in WP 12414(w) of 2008 **(*Smt. Rinku Sarkar v. The State of West Bengal & Ors.*,)** WP 12419(w) of 2008 **(*Srijit Pal v. The State of West Bengal & Ors.*,)** and WP 12420(w) of 2008 **(*Subimal Sinha v. The State of West Bengal & Ors*).**

2. The Division Bench upon noticing conflict between the views expressed in two earlier coordinate bench decisions in ***Tarak Chandra Roy v. State of West Bengal & Ors.,*** reported in **2008(2) CHN 973** (in short '**Tarak'**) and the ***State of West Bengal & Ors. v. Sauvik Ghosh & Ors***. reported in **2008(1) CLJ(Cal) 810** (in short '**Sauvik'**) formulated the following questions for consideration by the larger Bench:

> *a) Whether in view of the fact that acquisition of higher qualification or qualifications during the service career of an individual is his right and the same acts as an incentive to career advancement as well as acquiring a higher status of academic brilliance, can such a person be forced to stagnate on a lower status perennially and forced to continue to work on a lower scale of pay which is not commensurate to the higher qualification(s) acquired subsequent to his appointment?*
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> *b) Whether in view of Question No.(a) above, should it not be held that the ratio decided in Tarak Chandra Roy's case (supra) read with the provisions of Sections 14 and 20 of The West Bengal Schools (Control and Expenditure) Act, 2005 amount to creating an unreasonable embargo upon an individual's freedom and right to acquire higher educational qualification(s) and therefore, runs counter to the provisions of Article 14 of the Constitution of India?*
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> c) *If the answer to question no. (a) is in the negative and to question no. (b) in the affirmative then should it not be held that the provisions of Section 14 and 20 of The West Bengal Schools (Control and Expenditure) Act, 2005 are ultra vires the relevant provisions of the Constitution of India referred to above?*

d) *Whether in view of the aforesaid should it not be held that the ratio decided in Tarak Chandra Roy's case supra, holding that "the petitioner having been appointed in the pass category clearly, therefore, cannot get the benefit of his post graduate qualification" is not the proper proposition and that the correct proposition is the one that has been decidied in Sauvik Ghosh's supra holding, inter alia, in para 35 therein that if the Government order dated 18th July 1999 were to mean mutual fixation would be on the basis of the educational qualifications mentioned in the recommendation of the School Service Commission and a teacher appointed on the recommendation of the School Service Commission would be bound by the qualification as mentioned in the recommendation for all time to come and even on enhancement qualification the teacher would not be entitled to the higher scale of pay only because the School Service Commission had mentioned a different qualification in its initial recommendation, the Government Order would have to be struck down as totally arbitrary discriminatory and violative of Article 14.....?"*

3. Thereafter, another Division Bench in deciding FMA 2688 of 2007 with CAN 2357 of 2010 ***Nirmalendu Maity v The State of West Bengal*** upon noticing the constitution of a larger bench to answer the aforesaid questions by an order dated 15th March, 2010 referred the following question to the said larger Bench:

"Whether a teacher who has been appointed through West Bengal School Service Commission in 'pass category' can get the benefit of his post graduate qualification for the purpose of getting post graduate scale of pay?"

4. Subsequently, by an order dated 6th September, 2019 Justice Shampa Sarkar noticing apparent conflict in the views expressed in ***Anupam Santra v. State of West Bengal & Ors.*** in WP 25103 of 2012 and ***State of West Bengal & Ors. v. Chandra Bhusan Dwivedi*** in MAT 961 of 2017 with regard to interpretation of **Clause 12(5) of G.O. No. 25-SE(B)/IM-102/98** dated 12th February, 1999 and **G.O. No. 46-SE(B)/5B/1/2009** dated 27th February, 2009 framed the following questions for the larger bench to decide:-

> *1. Whether with the introduction of G.O. No.46-SE(B)/5B-1/2009 dated February 27, 2009 with retrospective effect from 1st January, 2006 and acceptance thereof by the petitioner prevented the petitioner from claiming a higher scale of pay on the basis of a Ph.D. degree awarded prior to January 1, 2006 but convocation whereof was held on February 24, 2006?*
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> *2. Whether Clause **12(5) of G.O. No.25-SE(B)/IM-102/98** dated **February 12, 1999** implementing ROPA, 1998 would be applicable in case of the petitioner in view of the omission of such a provision in **G.O. No.46-SE(B)/5B-1/2009** dated February 27, 2009, with retrospective effect?*

5. It appears that a special leave petition was filed by one Shohidullah against the State of West Bengal bearing Civil Appeal no. 3040-3041 of 2017 claiming higher scale of pay upon acquiring higher qualifications in which one Samsundar Mahato, Baishali Banerjee and Sauvik Ghosh have filed applications raising similar issues.

6. On 25th July, 2019 the Hon'ble Supreme Court after taking note of the order dated 22nd August, 2008 requested the High Court to expedite the hearing of the matter before the full Bench.

Submission on behalf of the State of West Bengal

7. The learned Advocate General appearing on behalf of the State of West Bengal in answer to question (a) has submitted that:

a. Mere acquisition of a higher educational qualification does not result in an automatic entitlement to a higher pay scale in the absence of any law providing for the same.

b. When the State decides to extend the benefit of a higher pay scale to a person for acquiring a higher qualification under a scheme for career advancement such a benefit is in the nature of an incentive framed under the executive policy of the State. These incentives are granted only after taking into consideration the financial implications of the same on the State exchequer. The continued existence of such incentives cannot be claimed as an enforceable right.

c. The State is entitled to discontinue its policy to grant incentives at any time and no vested right can be claimed to such incentives given earlier on the basis of a previous superseded policy of the State.

d. Incentives granted by the State can only be claimed in terms of the provisions of the law made or policy formulated on that behalf.

e. It has been well settled by several decisions, including that of the Supreme Court of India, that courts should in the absence of

any facially compelling reason disclosing arbitrariness, desist from stepping into the arena of decision making. Merely because the court has taken a view that a scheme for career advancement would not be an equitable one is not a ground to set aside the decision of the State, nor would the court direct reformulation of such scheme. Only a direction can be given to the State to consider the matter and take a decision.

f. In any event, the decision of the State not to grant the incentive of a higher pay scale for acquiring a higher qualification would not necessarily mean that a person would be forced to stagnate on lower status perennially. It would be open for a person to make use of the opportunity to compete for another post with a higher pay scale and also to utilise avenues for promotion to a higher post.

8. The learned Advocate General has referred to ***Wazir Singh, JBT Teacher and Ors. v. State of Haryana through its Secretary, Education Department and Ors.,*** reported in **1995 Supp.(3) SCC 697** to argue that in a similar situation the Hon'ble Supreme Court has held that the appellants who have not acquired the B.T/B.Ed. before 9th March, 1990 cannot claim the benefit of higher grade of pay scale automatically. This judgment was followed in ***State of Haryana & Ors. v. Ravi Bala & Ors.,*** reported in **1997 (1) SCC 267** where it is stated:

> *"3. The appellants are teachers in Government schools in the State of Haryana. The appellants were appointed as **(J.B.T.)** teachers in the schools as they did not possess B.T./B.Ed. qualification at the time of their appointments. However, they acquired B.T. B.ed. degree on various dates as mentioned in page 9 of the S.L.P. Paper Book and also at page 53 (so far as*

newly impleaded appellant No. 8 is concerned). They moved the High Count of Punjab & Haryana under Article 226/227 of the Constitution of India for the issue of writ of Mandamus directing the respondents to give them the higher grade admissible to the Masters with effect from respective dates of their acquiring B.T./B.Ed. qualifications and they also prayed for issue of writ of Mandamus to the respondents to implement the decision/ direction of this Court in the case of ***Chaman Lal v. State of Haryana*** *reported in [**1987]2SCR923** .*

4. In response to the notice of motion issued by the High Court, written statement on behalf of respondents was filed and therein it was brought to the notice of the Court that the erstwhile Punjab Government's Instructions dated July 23, 1957 on the basis of which the petitioners/ appellants rested their claims, stood superseded and no more applicable to the employees of the Haryana Government. It was also stated in the written statement that a policy decision was taken by the Government of Haryana in Finance Department Letter No. 7/2 (i)/90-FRI dated March 9, 1990 stating that the pay-scales admissible to the Masters, that is, B.A., B.Ed. would be given to such teachers who have been appointed against the posts for which the qualification is B.A. B.Ed. In the light of the written statement and also applying the earlier decision of the High Court in C.W.P. No. 14736 of 1991 dated December 1,1992, the learned Judges held that the appellants were not entitled to the reliefs prayed for as they were never appointed against the post of Masters. Aggrieved by the dismissal of the writ petition, the present special leave to appeal is preferred by the appellants.

5. Learned counsel for the appellants strenuously urged before us that the ratio laid down by this Court in [1987] 2 SCR 923

(supra) will apply in full force to the facts of this case and, therefore, the appellants would be entitled to succeed in the present appeal.

6. Learned counsel appearing for the respondents submitted that in Chaman Lal's case this Court was considering the scope of the letter dated July 23, 1957 issued by the composite Punjab Government in the light of subsequent order of Haryana Government dated 5.9.79. However, in the present case the letter dated 23.7.57 stood superseded by the latest policy instructions issued by the Haryana Govt. on 9.3.1990 and therefore, the judgment in [1987]2SCR923 will be no avail. He also invited our attention to the policy instructions contained in the letter dated 9.3.1990 which is Annexure III to the Special Leave Petition found at page 44." (Emphasis supplied)

9. Mr. Advocate General submits that parity in the pay on the basis of qualifications could be claimed provided the rules permitting for it and it may not have any retrospective operation. In ***State of Haryana & Ors. v. Kamal Singh Saharwat & Anr.*** reported in **1999 (8) SCC 44** the Hon'ble Supreme Court has clearly stated that teachers cannot claim higher pay on the scales of pay applicable to lecturers merely on their acquiring post graduate qualification without being appointed as lecturers.

10. Moreover, pay fixation is a complex matter and it is always advisable to rely on the recommendation of the expert body more conversant with the matter. The learned Advocate General has drawn attention to ***Union of India & Ors. v. M.V. Mohanan Nair*** reported in **2020 (5) SCC 421** (paragraphs 29 and 37) and submitted that higher scale of pay offered for Career Advancement is in the nature of incentive so that the teachers

would work efficiently despite not getting promotion and it cannot be treated as a fundamental right. The government has right to frame policy to ensure efficient and proper administration and to provide suitable avenues for promotion to officers working in different departments. However, a new policy introduced based on the recommendation of the experts or experiment by expert bodies are not to be lightly interfered. Equal pay for equal work is not a fundamental right vested in any employee though it is a constitutional goal to be achieved by the government. The Court should approach the matters with regard to the fixation of pay and determination of parities in respect of duties and responsibilities with due caution and interfere only when it is irrational, unjust and prejudicial. The incentives in terms of financial benefits which is now being made as the foundation for higher scale of pay being linked with higher qualification is analogous to modified assured career progress scheme which is also reflected in Rule 12 of ROPA 1990 and amended from time to time and those rules not being challenged and not being found arbitrary and irrational are required to be applied in answering the reference. The argument is based on the observation of the Hon'ble Supreme Court in ***M.V. Mohanan*** (*supra*) in paragraphs 3 to 5, 29, 36 to 38 and 56 which read:

> *"3. The main questions falling for consideration in these appeals are:*
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> > *(i) Whether MACP scheme entitles financial upgradation of pay to the next grade pay or to the grade pay of the next promotional post as envisaged under the ACP scheme? Whether MACP Scheme envisages grant of financial upgradation in Grade Pay Hierarchy and not in promotional hierarchy?*

(ii) As contended by the Respondents, whether MACP scheme is disadvantageous to the employees in comparison to ACP scheme as long as the financial upgradation is granted in hierarchy of grade pay under MACP scheme?

(iii) Whether Respondents are entitled to stepping up of their grade pay to be at par with grade pay of their juniors who were getting the higher grade pay on account of implementation of MACP Scheme?

4. Appeals relating to Issue No. III were ordered to be de-tagged and listed separately.

5. At the outset, it is to be pointed out that almost all the Tribunals/High Courts have only relied upon Raj Pal's case for grant of financial upgradation on promotional hierarchy and rejected the stand of the Appellant-UOI that under MACP scheme, the employees are entitled to financial upgradation of the next grade pay only. Since the matter was considered on merits and since the issue involves impact on the public exchequer and also interest of the staff of various establishments, we requested learned Senior Counsel, Mr. Jaideep Gupta to assist the Court as amicus curiae which the learned Senior Counsel has readily consented. Mr. Kunal Chatterji, learned Counsel has agreed to assist the learned Senior Counsel-amicus."

29. As pointed out earlier, both ACP and MACP Schemes are in the nature of incentive schemes devised with the object of ensuring that the employees who are unable to avail of adequate promotional opportunities, get some relief from stagnation in the form of financial benefits. Under the MACP Scheme, financial upgradations are granted at three regular intervals on completion of 10-20-30 years of service without promotion. Hence, it is also intended to ensure that the employees are adequately incentivised to work efficiently despite

not getting promotion for want of promotional avenue. The change in policy brought about by supersession of the ACP Scheme with the MACP Scheme is after well-deliberated and well-documented recommendations of the Sixth Central Pay Commission. Considering the various issues in the implementation of the ACP Scheme, the Pay Commission expressed its views "the only other way is to bring systematic changes in the existing Scheme of ACP so that all the employees irrespective of the existing hierarchy structure in their organisations/cadres, get some benefit under it". The Commission therefore, recommended that the existing Scheme of ACP be continued with the modifications indicated thereon in the Report that the financial upgradation has to be in the next immediate Grade Pay. One of the reasons for the expert body recommending the MACP Scheme was that there were interdepartmental disparities where several departments had varying promotional hierarchies. As a result, the working of ACP Scheme under which an employee who stagnated for 12 years, was entitled to pay in the Pay Scale of the next promotional post, led to inter-departmental anomalies. The Pay Commission therefore, recommended MACP Scheme with a view to putting an end to the problem ensuing from inter-departmental disparities.

36. In State of Tamil Nadu v. S. Arumugham (1998) 2 SCC 198, the Supreme Court has observed that the government has the right to frame a policy to ensure efficiency and proper administration and to provide to suitable avenues for promotion to officers working in different department. The Supreme Court has further observed that the Tribunal cannot substitute its own views for the views of the government or direct new policy based on the views of Tribunal.

37. Observing that fixation of pay and determination of responsibilities is a complex matter which is for the executive to take a decision, the courts should approach such matters with restraint,

in State of Haryana and Anr. v. Haryana Civil Secretariat Personal Staff Association (2002) 6 SCC 72, the Supreme Court held as under:

> *10. It is to be kept in mind that the claim of equal pay for equal work is not a fundamental right vested in any employee though it is a constitutional goal to be achieved by the Government. Fixation of pay and determination of parity in duties and responsibilities is a complex matter which is for the executive to discharge. While taking a decision in the matter, several relevant factors, some of which have been noted by this Court in the decided case, are to be considered keeping in view the prevailing financial position and capacity of the State Government to bear the additional liability of a revised scale of pay..... That is not to say that the matter is not justiciable or that the courts cannot entertain any proceeding against such administrative decision taken by the Government. The courts should approach such matters with restraint and interfere only when they are satisfied that the decision of the Government is patently irrational, unjust and prejudicial to a Section of employees and the Government while taking the decision has ignored factors which are material and relevant for a decision in the matter. Even in a case where the court holds the order passed by the Government to be unsustainable then ordinarily a direction should be given to the State Government or the authority taking the decision to reconsider the matter and pass a proper order. The court should avoid giving a declaration granting a particular scale of pay and compelling the Government to implement the same.*

38. The prescription of Pay Scales and incentives are matters where decision is taken by the Government based upon the recommendation of the expert bodies like Pay Commission and several relevant factors including financial implication and court

cannot substitute its views. As held in Haryana Civil Secretariat Personal Staff Association (2002) 6 SCC 72, the court should approach such matters with restraint and interfere only when the court is satisfied that the decision of the Government is arbitrary. Even in a case where the court takes the view that order/Scheme passed by the Government is not an equitable one, ordinarily only a direction could be given to the State Government or the authority for consideration of the matter and take a decision. In the present batch of cases where the Respondents are claiming financial upgradation in the grade pay of promotional hierarchy, no grounds are made out to show that the MACP Scheme granting financial upgradation in the next grade pay is arbitrary and unjust; warranting interference. The implementation of the MACP Scheme is claimed to have led to certain anomalies; but as pointed out earlier, MACP Scheme itself is not under challenge." (emphasis supplied)

56. The ACP Scheme which is now superseded by MACP Scheme is a matter of government policy. Interference with the recommendations of the expert body like Pay Commission and its recommendations for the MACP, would have serious impact on the public exchequer. The recommendations of the Pay Commission for MACP Scheme has been accepted by the Government and implemented. There is nothing to show that the Scheme is arbitrary or unjust warranting interference. Without considering the advantages in the MACP Scheme, the High Courts erred in interfering with the government's policy in accepting the recommendations of the Sixth Central Pay Commission by simply placing reliance upon Raj Pal's case. The impugned orders cannot be sustained and are liable to be set aside"

11. The learned Advocate General in advancing his submission has emphasised that the State is entitled to discontinue its policy of granting incentive at any time and no one can claim any vested right to such

incentive, as observed in ***Vice Chairman Delhi Development Authority v. Narender Kumar and Ors.,*** reported in **2022 SCC Online SC 273.** It is submitted that similar argument of extension of similar benefits irrespective of discontinuation of MACP scheme or SEP benefit have been turned down by the Hon'ble Supreme Court in ***Narendra Kuman*** (*supra*).

12. Our attention is drawn to paragraphs 31, 32, 33 and 34 of the said judgment, which read:

> *"31.This brings the court to the next point, which is whether the employees can assert what is termed as a vested right. The first submission in this regard is that according to Para 9 of the MACP scheme, those who are in employment on the date when MACP scheme was brought into force and who are entitled to the ACP benefits, especially the second financial up-gradation had a right to insist that their second up-gradation should be granted in terms of the ACP scheme. In this context, the argument advanced is that Rule 9 preserves and protects such a right (for entitlement) to be granted the ACP benefits even after the introduction of the MACP scheme.*
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> *32. Para 9 recognises the fact that if there is any ambiguity in the interpretation of the MACP scheme it would be resolved by the Department of Personnel and Training. It also clarifies in the last sentence that financial up-gradation would be granted till 31.08.2008 (given that the MACP scheme itself became operative on 01.09.2008), although the office memorandum was issued on 19.05.2009. In the opinion of this Court the undue influence placed upon the last sentence cannot be met much of by the employees given that the ACP scheme itself ended on 31.08.2008. This provision (i.e. Para 9) was made to cater to*

the situations where the grant of ACP benefits was under process, this would mean both types of benefits i.e. the first and the second up-gradation. Doubtlessly, the first up-gradation under the ACP scheme was to be granted after 12 years. If Para 9 were to be considered in the context of the first up-gradation it is a clarification to the effect that the individual concerned who has crossed 12 years' service (and therefore became eligible and whose case is under active consideration) would get the ACP benefits. However, this provision cannot be understood as an independent transitional provision, enabling all employees awaiting the up-gradation to insist that the benefit of the ACP scheme should indefinitely continue despite its ceasing to exist after 31.08.2008.

33. The second aspect in this regard is the argument that a vested right accrued in favour of the employees who had completed the eligibility for a financial up-gradation to insist that such up-gradation ought to be only under the ACP scheme and not under the MACP scheme.

34. The concept of "vested right" has arisen for consideration before this Court in several contexts especially with respect to alteration of service condition of public employees. That the Central Government in the exercise of its legislative powers conferred under provision of Article 309 of the Constitution can frame Rules which has the force of law has been settled several decades ago. This Court has also held that such Rules can be made to operate from anterior date by giving retrospective effect to them. The determination of an anterior date for the operation of a Rule which has the effect of nullifying or refacing intervening events or invalidating benefits which had been granted to public employees was held to be unconstitutional in State of Gujarat v. Raman Lal Keshav Lal Soni (1983) 2 SCR

287. Several previous judgments of this Court dealing with the question that what is accrued or vested right were considered in Chairman, Railway Board v. C.R. Rangadhamaiah 1997 Supp (3) SCR 63 wherein the impugned Rule in question sought to disturb the method of calculating the last pay drawn for the purposes of pension and related allowances. This impacted the pension disbursement of a large number of employees who had retired much earlier. The court observed that the amendments applied to employees who had already retired and were no longer in service on the date the impugned notifications were issued, and adversely impacted the pension they were drawing. In such context the court held as impermissible, those benefits which accrued or in other words had been actually enjoyed and were taken away by the devise of giving retrospective effect to the rule. The court observed as follows:

> *22. In State of Gujarat v. Raman Lal Keshav Lal Soni (1983) 2 SCC 33] decided by a Constitution Bench of the Court, the question was whether the status of ex-ministerial employees who had been allocated to the Panchayat service as Secretaries, Officers and Servants of Gram and Nagar Panchayats under the Gujarat Panchayat Act, 1961 as government servants could be extinguished by making retrospective amendment of the said Act in 1978. Striking down the said amendment on the ground that it offended Articles 311 and 14 of the Constitution, this Court said:*
>
> > *52. ... The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do's and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene*

> *Fundamental Rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history.*

23. The said decision in Raman Lal Keshav Lal Soni (1983) 2 SCR 287 of the Constitution Bench of this Court has been followed by various Division Benches of this Court. (K.C. Arora v. State of Haryana (1984) 3 SCR 623; T.R. Kapur v. State of Haryana (1987) 1 SCR 584]; P.D. Aggarwal v. State of U.P. (1987) 3 SCR 427]; K. Narayanan v. State of Karnataka 1994 Supp (1) SCC 44]; Union of India v. Tushar Ranjan Mohanty (1994) 5 SCC 450] and K. Ravindranath Pai v. State of Karnataka 1995 Supp (2) SCC 246).

24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant Rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the Rule in force at that time. It has been held that such an amendment having retrospective

> *operation which has the effect of taking away a benefit already available to the employee under the existing Rule is arbitrary, discriminatory and violative of the rights guaranteed Under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in Roshan Lal Tandon (1968) 1 SCR 185] B.S. Vadera (1968) 3 SCR 575] and Raman Lal Keshav Lal Soni (1983) 2 SCR 287].*
> (emphasis supplied)

13. It is submitted that they may have an expectation of their case being considered for higher scale of pay upon acquiring higher degree but it cannot crystalise into a right enforceable in law. The ROPA rules have undergone changes over a period of time based on experience and other factors and the necessity to enact the 1997 Act and 2005 Act would clearly justify that unless a higher qualification is acquired with prior permission, the teachers enjoying benefits of higher scale of pay prior to the introduction of the said two Acts would not acquire a vested right and cannot insist for continuation of such higher scale of pay based on higher qualification.

14. Our attention is drawn to the views expressed by a coordinate bench in ***Pradip Kumar Karak and Ors. v. The State of West Bengal & Ors.,*** reported in **2018 (4) CHN 131** paragraph 112 in particular in support of the contention that the present petitioner cannot claim any vested right upon acquiring higher qualification after the Act and the relevant rules operating in the field came into force. Paragraphs 112 and 140-142 relied in this regard are reproduced below:

" 112. It is clear therefore, that the Writ Petitioners/Appellants No. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 19, 21 and 22 acquired their higher qualifications after the benefit granted to rural librarians by the Memorandum Beta dated March 7, 1990 had been taken away, and substituted by way of amendment by Memorandum Gamma dated July 21, 1990 by another sentence in paragraph 16(3) of the said Memorandum dated March 7, 1990 which made it clear that where necessary separate orders would be issued. Since all these writ petitioners/Appellants acquired their higher qualifications after July 21, 1990, when the said amendment had already taken place, they had no vested right which was being affected. By the time they had acquired their higher qualification, there was no statutory rule as would allow them to claim the benefit automatically. If there is no rule allowing something to be done, but in fact a deliberate "amending out" of a previously extant rule which had allowed it to be done, then it is to be necessarily inferred that the State of West Bengal in its wisdom did not want that "something" to be done. There was, therefore, no legal right inhering in the said writ petitioners/Appellants to claim a higher scale of pay. It is to be noted that they did not seek that on introduction of the amendment by Memorandum gamma dated July 21, 1990.

140. Those librarians who acquired higher qualifications after July 21, 1990 had no legal right to move the writ court for enforcement of the terms of un-amended paragraph 16(3) of memorandum dated March 7, 1990. The benefit that was conferred thereby was plainly not there when they moved the writ court. Rightly so, it is proposed by my learned brother that such of the appellants who acquired higher qualifications after the cut-off date i.e. July 21, 1990, are not entitled to the benefit

of higher pay and I fully agree with His Lordship that the appeal at their instance ought to be dismissed.

141. At this stage, it is also considered appropriate to record my agreement with the views expressed by my learned brother that neither is the decision in Shibnath Koley (supra) a judgment in rem nor are the librarians who have acquired higher qualifications after the cut-off date entitled to any benefit flowing from memorandum dated June 10, 2014, as interpreted in the order of the learned Judge dated June 9, 2016 while disposing of a batch of writ petitions with W.P. 7150(W) of 2015 being the lead case. With utmost respect to the learned Judge who decided W.P. 7150(W) of 2015, the memorandum dated June 10, 2014 [which allowed benefits of better pay to the librarian respondents in Shibnath Koley (supra)] was misread and, therefore, cannot be of any persuasive value. Insofar as the decision of the coordinate Bench dated January 4, 2017 in State of West Bengal v. Rafique Sekh (of which I was a member) is concerned, the appeal of the State was dismissed not because the aforesaid decision dated June 9, 2016 in W.P. 7150(W) of 2015 had been found to be legal but on the premise that the State not having challenged such decision in an appropriate proceeding, the same had attained finality and further orders on the administrative side could not have been passed contrary to such final and binding decision.

142. However, those librarians who have acquired higher qualifications before the cut-off date of July 21, 1990 are entitled to claim that they be treated at par with the librarians (Shibnath Koley & others) who were before the Hon'ble Supreme Court as respondents in Civil Appeal Nos. 6967-6970 of 2009. In fact, the State in its counter-affidavit before the Hon'ble Supreme Court was also candid in its stance that at

*least some of the appellants were entitled to better pay based on higher qualifications without, however, identifying them. In my opinion, the issue as to whether the librarians who had acquired higher qualifications before the cut-off date i.e. July 21, 1990 is no longer res integra in view of the decision of the Hon'ble Supreme Court in Shibnath Koley (supra).” (*emphasis supplied)

15. Mr. Advocate General has relied upon the Division Bench Judgment of Karnataka High Court namely ***K. Narayana v. State of Karnataka*** reported in **ILR 1991 KAR 3283** that reiterated the same principles that incentive cannot be elevated to the status of a vested right.

16. In answering question (b) the learned Advocate General has argued that:

a. The omission or absence of any rule granting of a higher pay scale has no nexus and relation to, and does not in any manner create, an embargo upon an individual’s freedom and right to acquire higher educational qualification(s).

b. Sections 14 and 20 of The West Bengal Schools (Control of Expenditure) Act, 2005 (‘2005 Act’) do not in any manner seek to interfere with the right or freedom of an individual freedom to acquire a higher qualification.

c. Section 14 and 20 of the 2005 Act provide as follows:

> “14(1). Every teacher of a school shall, if appointed in the post of Undergraduate teacher category be entitled to draw pay in the scale of pay in which he is appointed and shall not be entitled to claim any additional increment or higher scale of pay for

acquiring any qualification other than the qualifications specified for such post.

(2) Every teacher of a school shall, if appointed in the post of graduate teacher category, be entitled to draw pay in the scale of pay in which he is appointed and shall not be entitled to claim any additional increment or higher scale of pay for acquiring any qualification other than the qualifications specified for such post.

(3) Every teacher of a school shall, if appointed in the Honours Graduate or Postgraduate teacher category, be entitled to draw pay of Post-graduate teacher category, upon acquiring Post-graduate degree, in the manner as may be specified by order."

"20. The provisions of this Act or any rules or orders made thereunder shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force or in any contract, custom or usages to the contrary." (emphasis supplied)

Section 14 of the Act only relates to the entitlement of an individual to a higher pay scale. It is submitted that neither section 14 nor section 20 relate to or affect the freedom of an individual to acquire a higher qualification.

d. The decision in Tarak Chandra Roy v. State of West Bengal & Ors. decided on 17th January, 2008, does not relate to nor does in any manner seek to create embargo upon an individual's freedom and right to acquire higher educational qualification. The question involved in that case was as follows:

"After the School Service Commission Act, 1997 came into force, would the appointees get benefit of higher scale of pay despite being interviewed and selected in "Pass category".

e. Furthermore, it is not the contention in any of the writ petitions before this Court that an embargo has been created upon an individual's freedom or right to acquire higher educational qualification(s).

f. A freedom or right to acquire a higher qualification does not automatically result in an entitlement to a higher pay scale in the absence of any law providing for the same.

g. In any event, there is no fundamental right to acquire higher education. Article 45 of the Constitution, before the Constitution (Eighty-sixth Amendment) Act, 2002, provided that the State shall endeavour to provide free and compulsory education for all children up to 14 years of age, within 10 years from the commencement of the Constitution. In the case of ***Unni Krishnan, J.P. v. State of A.P.,*** reported at **(1993) 1 SCC 645**, it was noticed that 10 years had long gone by, and no provision was made imposing an obligation upon the State to ensure the right to free education of every child upto the age of 14 years. Article 21-A of the Constitution was inserted by the Constitution (Eighty-sixth Amendment) Act, 2002, which recognized the right to free and compulsory education for all children only of the age 6-14 years. Higher education has not been recognized as a fundamental right under Part III of the Constitution.

17. In answering question (c) the learned Advocate General has argued that:

> Firstly, this question cannot arise at all for consideration since neither the answer to question (a) is in the negative, nor the answer to question (b) is in the affirmative.

Secondly, there was no challenge to the vires of sections 14 and 20 of the 2005 Act in any of the writ petitions before the court in which the order of reference dated 22nd August, 2008 has been passed.

Thirdly, there was also no challenge to the vires of Section 14 and 20 of the 2005 Act before the court in the case of ***Tarak Chandra Roy v. State of West Bengal & Ors.*** decided on 17th January, 2008, or in the case of ***The State of West Bengal v. Sauvik Ghosh & Ors***., decided on 8th April, 2008.

18. In the writ petitions before this bench, a challenge to the vires of Section 14 of the 2005 Act has only been made in WP 9921(w) of 2007 on the ground that it would render the order dated 22nd September, 2004 passed by a learned Single Judge of this Court otiose.

19. Mr. Advocate General has submitted that in any event and without prejudice to the above, Sections 14 and 20 of the 2005 Act cannot be said to be ultra vires Article 14 of the Constitution.

20. Mr. Advocate General has submitted that a law can be challenged only on the following four grounds:

i. It is beyond the competence of the Legislature;

ii. It violates Article 13 of the Constitution;

iii. It is enacted contrary to a prohibition in the Constitution; and

iv. It is enacted without following the procedure laid down in the Constitution.

In this regard he has relied upon the decision in ***Supreme Court Advocates on Record Association v. Union of India*** reported at **(2016) 5 SCC 1, Paras 852-857** at pages 642-644 of the Report.

21. These grounds have not been taken in any of the writ petitions before this court to challenge sections 14 and 20 of the 2005 Act.

22. The competence of the Legislature to enact the 2005 Act is not in dispute.

23. The attention of the court is drawn to the statement of Objects and Reasons of the 2005 Act which states as follows:

> *"1. The matters relating to creation of posts, approval of panels, appointment of teachers, regularisation of services of teaching and non-teaching staff, sanction of higher scale to teachers on account of acquiring higher qualifications of teachers, in the school and the Madrashas in the State of West Bengal, and recognition and upgradation, and expenditure for management, of such schools and Madrasahs, are presently governed, inter alia, by the administrative orders, directions and circulars issued from time to time by the School Education Department.*
>
> *2. As such, administrative orders, directions and circulars do not have any statutory base, it has been experience, with the passage of time, that they are often challenged in the Courts of law, causing huge financial burden on the State Exchequer.*

> *3. It has therefore been felt necessary and expedient to frame a separate statute for streamlining the management of schools and Madrasahs in the State of West Bengal and for regulating and controlling the expenditure to be incurred out of the appropriate Budgetary provisions.*
>
> *4. The Bill has been framed with the above objects in view.*
>
> *5. No additional expenditure is envisaged to give effect to the provisions of the Bill".* (emphasis supplied)

24. It is submitted that the Preamble to the 2005 Act clearly defines its purpose as it states:

> "An Act to provide for the control of expenditure in the Schools in West Bengal"

25. The State has consciously decided to grant incentives of higher pay scale for obtaining higher qualification only after taking into consideration the financial implication of granting such incentives on the State exchequer. The State is entitled to discontinue its policy to grant such incentives at any time and the continued grant of incentives cannot be claimed as a matter of right.

26. The grant of incentives at an earlier point of time does not create any vested right in favour of a person to be continued to be granted such incentives. Therefore, there cannot be said to be any discrimination between the persons who have received such incentives under a previous policy of the State and persons covered under a later policy of the State. As a result, the challenge on the basis of Articles 14 and 16 of the Constitution does not lie.

27. There is no fundamental right recognised under part III of the Constitution permitting automatic grant of a higher pay scale upon obtaining a higher educational qualification.

28. There is no prohibition in the Constitution preventing the State from enacting sections 14 and 20 of the 2005 Act nor has any prohibition been indicted to the court in any of the writ petitioners.

29. Furthermore, there is no allegation that the 2005 Act has been enacted without following the procedure laid down in the Constitution.

30. Section 14 of the 2005 Act permits regulating and controlling expenditure to be incurred out of appropriate budgetary provisions. This is within the domain of the state legislature and/or state policy.

31. In so far as the grounds taken in **WP 9921(w) of 2007, (*Utpal Kanti Karan v. State of West Bengal & Ors.),*** is concerned it is argued that none of the grounds could form the basis of a challenge of a law made by the legislature as recognised in the decision of ***Supreme Court Advocates on Record Association*** (*supra).* It is always open to the legislature to change the law provided it possesses the necessary legislative competence. In this case there is no dispute as to the legislative competence to enact the 2005 Act.

32. In answering question (d) the learned Advocate General has argued that it would be necessary to refer to the evolution of law in this

regard since promulgation of ROPA 1990 on March 7, 1990 till promulgation of Government order no.593 dated 27th November, 2007.

33. It is submitted that the different ROPA Rules between the aforesaid period read with the West Bengal School Service Commission Act, 1997 and West Bengal School (Control and Expenditure) Act, 2005 would show that the higher scale of pay is linked to the higher qualifications and hedged with certain conditions like prior permission of District Inspector of schools concerned. A teacher joining the service as a pass graduate cannot claim higher scale of pay on acquiring higher qualification unless the staff pattern permits and with the prior permission in respect of relevant subject. Mr. Advocate General has taken us through ROPA Rules since 1970 till 2009 and the relevant provisions of the West Bengal School Service Commission Act 1997 as well as the West Bengal School (Control and Expenditure) Rule, 2005. Mr. Advocate General has submitted that the Rules for Revision of Pay and Allowances (ROPA 1970) was first published on and from 1st March, 1971 on the recommendation of the first pay commission. Thereafter by a Government order no. 60 issued on 15th January, 1972 with effect from 1st February, 1972 a change was introduced with regard to prescribing scale of pay on the basis of academic qualifications as it was noticed that the aforesaid system introduced with the object of engaging teachers to meet their qualifications with a view to bring out a qualitative improvement in the standard of teaching in secondary school did not actually work to the benefit of the institution or the students for the additional expenditure incurred towards higher scale of pay

to the teachers. On reconsideration while giving incentive to the teachers to improve their qualification, the criterion of teaching staff pattern in secondary and higher secondary school was introduced with the norms being laid down in this regard. It stipulates that for junior sections, no teacher with Honours degree would be approved and even if a teacher subsequently acquires higher qualification, he/she would be treated as a "pass graduate" for the purpose of financial benefits and for senior sections, if any existing teacher subsequently improves his qualification, he would be treated as a "pass graduate" for the purpose of financial benefits until he is absorbed in a suitable vacancy within the overall sanctioned strength.

34. Thereafter on 8th July, 1974 State Government issued an order no. 772 prescribing revised pattern of teaching staff. On 31st July, 1991 following the recommendation of 2nd Pay Commission ROPA 1981 was published. Certain qualification to ROPA 1981 was issued by Government Order no.59 dated 16th January, 1992 which, inter alia, provided that existing teachers who wish to improve their qualifications relevant to their teaching subjects (subject relevant would mean the subject in which the teacher was appointed) may do so on receipt of prior permission only relevant to their teaching subject from directorate/employer. This qualification has introduced the requirement of "*prior permission only relevant to the teaching subject of the teacher*" from directorate/employer. The position of the teachers *vis-a-vis* their higher qualification being linked to higher scale of pay has undergone a sea change with the introduction of ROPA 1990 as per the recommendation of 3rd Pay Commission. These rules

were given retrospective effect from 1st January, 1986 with actual payment till 1998.

35. Mr. Advocate General has relied upon rule 16 of ROPA 1990 which refers to "career advancement scheme" and related issues Specific attention was drawn to Rule 16(3) which refers to improvement of qualifications by the teachers in subject or group relevant to their teaching. Rule 16(3) reads as follows:

"16. Career advancement Scheme and related issues:

(3) All teachers and librarians of secondary schools "who have improved/will improve their qualification or who were appointed with higher qualification in subject or group relevant to their teaching/appointment shall get higher scale of pay appropriate to their qualifications, with effect from the 1st January, 1986 or the date of improving qualification whichever is later." (emphasis supplied)

36. Mr. Advocate General submits that the aforesaid rule contemplates teachers who have already improved their qualifications or would improve their qualifications or who were appointed with higher qualifications in subject or group relevant to their teaching/appointment to get higher scale of pay with effect from 1st January 1986 or the date of improving qualifications which is later. It would thus benefit three categories of teachers. Similar benefit was extended by the Government order no. 795 dated 22nd November, 1993 with regard to physical education teacher having higher qualification of Master Degree who were not being granted higher scale of pay presumably due to absence of any provision for

post graduate physical education teachers in the staff pattern laid down in government order dated 8th July, 1974. The physical education teacher having master degree henceforth would be entitled to get higher scale of pay in relaxation to the aforesaid staff pattern. By a government **Order 796** dated 22nd November 1993 noticing that teachers having higher qualification in the relevant subject were not being granted higher scale of pay presumably due to lack of suitable provisions for teachers in social science group, language group and science group in terms of government order dated 8th July, 1974 and 15th January 1972 it was clarified that in view of the memos dated 31st July, 1981 and 7th March, 1990 all such teachers with higher qualification of post graduate degree or equivalent in the relevant subject will be entitled to get higher scale of pay in relaxation to the aforesaid staff pattern. A government **Order no. 417** dated 8th March, 2000 as a clarification to Government **Order No. 795** dated 22nd November, 1993 was issued to extend the benefit of higher scale of pay would be admissible to only those Physical Education teachers who obtained their master degree on completion of two years regular course from a recognised university. The government noticing that teachers who have obtained higher qualification in subjects not relevant to their respective subject in which they were appointed but relevant to their respective teaching subjects issued a **Government Order no. 57** dated 27th January, 1995, granting higher scale of pay. However, prior permission of the District inspector of Schools would be required when taking classes not relevant to their respective subject.

37. Thereafter the West Bengal School Service Commission Act, 1997 came into force on and from 1st July, 1997.

38. The learned Advocate General has referred to Sections 7, 8, 9 and 10 of the said Act.

39. It is submitted that Section 7 contains a non-obstante clause and it requires the Regional Commission to select persons for appointment to the post of teachers in schools. The manner and scope of appointment are indicated in Section 8. Section 9 contains a non-obstante clause and it provides that appointments to the post of teachers in a school shall be made on the recommendation of the Regional Commission having jurisdiction. The terms and conditions of the service of teachers in employment before the commencement of the 1997 Act are protected under Section 10 as it restricts the authorities not to vary such terms to their disadvantages.

40. The Government **Order no.548** dated 24th June, 1997 requires all the teachers who desire to enrol for examination conducted through correspondence/distance mode of education from UGC affiliated Universities to take prior permission from the District Inspector of Schools (SC) through Managing committee and/or ad hoc committee and/or administrator. The Managing Committee while sending the case for approval, would have to include their comments regarding relevance of the subject of higher studies and also whether such higher studies are likely to affect the duties of the teacher in the school.

41. On 1st November, 1997 the West Bengal School Service Commission Rules 1997 (thereafter referred to as "1997 Rules") was promulgated vide notification dated 3rd October, 1997 published in the government Gazette on 1st November, 1997. Our attention is drawn to Rule 7 of the 1997 Rules which provides that the State Government in the School Education Department would lay down the procedure for recruitment of teachers. This was followed by a notification dated 8th January, 1998 published in the Calcutta Gazette on 15th January, 1998 that laid down a procedure for selection of recruitment of teachers as envisaged in Rule 7 of 1997 Rules. The qualification prescribed for Assistant Teachers in physical education was a Bachelor's degree.

42. The manner of distribution of staff in different groups in schools was laid down in Government **Order no. 670** dated 4th September, 1998.

43. Mr. Advocate General submits that the Rules for Revision of Pay and Allowances (ROPA 1998) was issued on 12th February, 1999 as per the recommendation of the Pay Commission with effect from 1st January, 1996 with actual payment from 1st April, 1997. The said Rules are to be considered along with the Government orders issued between 12th February, 1999 and 13th May, 2005 with a view to appreciate the claim for higher scale of pay by a teacher.

44. Our attention is drawn to Rule 12(3) of the ROPA 1998. It provides as follows:

"12. Career Advancement Scheme and related issues:

> (3) All teachers including physical Education teachers and librarians of Secondary Schools who have improved/will improve their qualifications who were appointed with higher qualification in the subjects or groups relevant to their teaching/appointment shall get higher scale of pay appropriate to their qualifications, with effect from the 1st January, 1996 or the date of improving qualifications whichever is later." (emphasis supplied)

45. Subsequently by a memorandum dated 12th February, 1999 ROPA 1998 was amended by adding a proviso to rule 12(3):

Rule 12(3) as amended provided as follows:

> "3. All teachers including physical Education teachers and librarians of Secondary Schools who have improved/will improve their qualifications or who were appointed with higher qualification in the subjects or groups relevant to their teaching/appointment shall get higher scale of pay appropriate to their qualifications, with effect from the 1st January, 1996 or the date of improving qualifications whichever is later, provided that such higher qualified teachers in the relevant subjects or group is justified as per approved staff pattern of that school. If such teacher is appointed through West Bengal School Service Commission, his/her pay will be fixed in the scale of pay as per his/her qualification mentioned by the West Bengal School Service Commission" (emphasis supplied)

46. The Government **Order no. 795** dated 22nd November 1993 was clarified by the Government **Order no. 417** issued on 8th March 2000, in which, it was stated that the benefit of higher scale of pay would be admissible to only those physical education teachers who obtained their Masters degree on completion of 2 years regular course from a Recognised

University. This order was to take effect from the date of its issuance i.e. 8th March, 2000.

47. On 3rd June, 2002, Rule 12(3) was further amended by government **Order no. 735** dated 3rd June, 2002. After amendment, all Honours Graduate teachers appointed through the WBSSC who have obtained Post Graduate degree in the subject relevant to their appointments prior to their date of joining in the school or who have completed their studies at the post graduate level in the subject relevant to their appointment or have appeared at the examination but the result was not published till the date of joining may be allowed higher scale of pay with effect from the date of joining or the date following the last date of examination, whichever is later.

48. This was in view of the fact that Honours Graduate candidates have to compete with post graduate candidate in the test held by WBSSC and a single panel is prepared by WBSSC for the two sets of degree holders.

49. The position of the teacher appointed after enactment of West Bengal School (Control of Expenditure) Act 2005 would be governed by the provision of the Act and the Government orders and memoranda issued between 19th August, 2005 and 27th February, 2009. The 2005 Act came into effect from 19th August, 2005.

50. On 20th January, 2005 the West Bengal Board of Secondary Education (Conduct and Discipline of Teachers and Non-Teaching staff) Regulations 2004 (in short, "2004 Rules") was promulgated. Under Rule 25

every teacher is required to submit an application for appearing in any examination through the appointing authority and with the approval of the committee.

51. The said Rule was further amended on 30th May, 2005 to provide that every teacher shall submit an application for appearing in any examination to the appointing authority and seek prior approval of the District Inspector of School if there is any financial involvement. The amendment would clearly show that the teacher concerned would be required to seek prior approval of the District Inspector of School in the event it entails any financial implication. The position of the teachers appointed after enactment of West Bengal School (Control and Expenditure) Act 2005 was explained by referring to the 2005 Act and various government circulars issued thereunder till 22nd November, 2007.

52. Mr. Advocate General has referred to Sections 4, 14, 16 and 20 of the said Act and submits that by reason of Section 4 school authorities cannot create any teaching or non-teaching post involving any financial liability on the state exchequer, without previous sanction of the State Government and grant any special pay or allowance or any other benefit having financial implication to any person holding teaching or non teaching post.

53. In terms of Section 14 of the Act no additional increment of higher scale of pay could be granted for acquiring any qualification other than the qualification specified for the post and that a teacher if appointed

in Honours Graduate or Post Graduate category shall be entitled to draw pay of Post Graduate category upon acquiring Post Graduate degree as may be specified.

54. Under Section 16 of the Act the terms and conditions of the service of teachers in employment before the commencement of the 2005 Act shall not be varied to their disadvantage.

55. Section 20 of the Act provides that the 2005 Act along with rules and orders would have overriding effect over any other law in conflict with the provisions of this Act.

56. On 26th December, 2005 government **Order no. 1595** was issued under Section 14(3) of the 2005 Act, specifying the manner in which a teacher of a school if appointed in Honours graduate or post graduate category would be entitled to draw "pay of post graduate category" upon "acquiring post graduate degree".

57. The aforesaid government order stipulates that for improvement of qualification after joining the post prior permission of the competent authority would be required.

58. Subsequently, **Memorandum no. 151** was issued on 12th May, 2006 to sanction "Protection of Pay" to those teachers whose pay had been fixed at a lower stage than their contemporary/junior teaching staff who were in receipt of higher pay before the benefit of CAS was granted to the latter.

59. Our attention is drawn to Government **Order no. 593** issued on 27th November, 2007 under Section 14(3) of the 2005 Act replacing all earlier circulars and modifying Government **Order No. 1595** dated 26th December, 2005. It provided, *inter alia*:

(i) All Teachers required to seek prior permission of the Managing Committee/Head of Committee/Administrator, to enrol for any examination for enhancement of qualification.(Clause 1)

(ii) Teachers required to seek prior permission of the District Inspector of Schools (SE), if he/she wishes to claim higher scale of pay for obtaining higher qualification through Management Committee of the School. (Clause 3)

(iii) No permission to be granted to any teacher who entered the service with graduate degree and graduate scale of pay.(Clause 4)

(iv) The courses to be studied should be "relevant to the subjects already studied". (Clause 5)

60. It is submitted that prayers from teachers who had already secured higher qualification prior to the 2005 Act for higher scale of pay may be considered only by the District Inspector of Schools (SE), with approval of Director of School Education after examining staff pattern. In terms of Clause 6 and 7 of the above government order dated 27th November, 2007 no such prayer would be entertained from any teacher with

graduate degree and graduate scale of pay at the time of entry into service irrespective of whether the higher qualification was secured before or after the 2005 Act.

61. For the purpose of completeness it is submitted that on 27th February, 2009 a memorandum containing the Rules for Revision of Pay and Allowances **('ROPA 2009')** was issued as per the recommendation of the Pay Commission. The Rules were to take effect from 1st January, 2006 with actual payment from 1st April, 2008. The 2005 Act was further amended on 2nd February, 2017.

62. Mr. Advocate General has submitted that as the relevant rules prior to 2005 Act or the vires of the 2005 Act was not under challenge and having regard to the fact that the relevant government orders both prior to 1997 Act and subsequent thereto emphasise that the appointment to the post is the deciding factor with regard to scale of pay the decision in Tarak Chandra Roy (*supra)* requires approval.

63. Mr. Advocate General in answer to the questions referred to this Special Bench by order dated 6th September, 2019 has referred to Rule 12(5) of the ROPA 1998 which came into force on and from 1st January, 1996. The said Rule provides as follows:

> *"12(5) Secondary teachers Headmasters/Headmistresses with Doctorate degree in the subject taught or in an allied subject shall get <u>two additional increments from the date of the convocation of which such degree is awarded</u>.*

Provided that those who obtained this degree prior to the date of coming over to the revised scale shall get two additional increments from the date with effect from which they elect to draw pay in the revised scales, provided that they have not already got such additional increments in the earlier pay revision and provided further that in the latter case, pay should be fixed at least at the third stage of the relevant scale of pay." (emphasis supplied)

64. Mr. Advocate General submitted that the said rule unmistakably shows that the entitlement under ROPA 1998 to claim additional increments is from "the date of the convocation" which such degrees are awarded. ROPA 1998 was replaced by ROPA 2009 which was effective from 1st January, 2006. There is no provision for payment of increments in ROPA 2009 as was previously contained in Rule 12(5) of ROPA 1998. After coming into effect of ROPA 2009, ROPA 1998 ceased to have effect. The writ petitioners who have claimed benefit of increments have already exercised their option under ROPA 2009 and hence they are not entitled to the benefits of increments under ROPA 1998 in view of the judgment of the Division Bench on 4th December, 2019 in FMA 442 of 2019 in CAN 4752 of 207 (***The State of West Bengal & Ors. v. Smt. Mala Sanyal***).

65. Mr. Advocate General has submitted that the Coordinate Bench of which one of us (Soumen Sen, J.) was a member has held that a person claiming/accepting benefits, by exercising their option under a subsequent ROPA could not claim benefits granted by earlier memorandum and in this regard has placed reliance on the following paragraphs:

"We have to decide the lis between the parties on the basis of the law operating in the field as of date. The decision in Pradip Kumar Karak & Ors. (supra) is the law laid down by the coordinate Bench. Apart from the well recognised principle of binding precedent we also feel that the memorandum dated 21st July, 1990 clearly excludes the writ petition. There cannot any doubt that the memorandum of 21st July, 1990 is an important document which clearly excludes the respondent/writ petitioner and many others who have acquired qualification post dated 21st July, 1990 and before 26th July, 1994. We are referring to these particular memoranda because 26th July, 1994 puts an end to any claim that may be made by respondent/writ petitioner or persons similarly placed who have acquired qualification post 21st July, 1994. In the meantime, ROPA 1999 had come into play by which it seems that the respondent authorities have tried to bring a pay parity amongst different classes of its employees with effect from 1st January, 1996. The respondent/writ petitioner exercised option under ROPA 1999 for receiving benefits with effect from 1st January, 1996 of higher scale of pay. This appears to be a conscious decision by the writ petitioners and it is an important factor to be taken into consideration at this stage because on that date it was possible for him to challenge the basis of the memorandum dated 21st July, 1990. It is clear case of waiver of right. Apart from waiver of right, we are in agreement with the view expressed by the co-ordinate Bench that the circular dated 21st July, 1990 is a clear bar to avail any benefit on the basis of higher qualification acquired on or after 21st of July, 1990 in absence of any separate Government Orders.

There is another aspect to this matter;

At the relevant point of time it was incumbent upon the writ petitioner, before acceptance of a higher scale of pay under ROPA 1990, to claim

higher scale of pay on the basis of the Memorandum dated 7th March, 1990, and to challenge the Memorandum dated 21st July, 1990 and the Memorandum dated 26th July, 1994 which put an end to any claim that could have been made on account of higher scale of pay upon acquiring higher qualification. The writ petitioner continued to avail the benefit of ROPA 1990, ROPA 1998 and ROPA 2009 until the writ petitioner filed the writ application in the year 2015, being W.P. No. 20521 (W) of 2015, on the basis of the judgment in Sibnath Koley (supra). Benefits of ROPA 1998 and ROPA 2009 was conferred upon the writ petitioner upon exercising option."

66. Mr. Advocate General has submitted that the convocation of the petitioner was admittedly held after the coming into force of ROPA 2009 and, therefore, the petitioner has no vested rights to claim an incentive under the previous ROPA i.e. ROPA 1998.

67. Mr. Advocate General has submitted that the Division Bench in MAT 961 of 2017 (***State of West Bengal v. Chandra Bhusan Dwivedi***) reported at **2019 SCC Online Cal 6530** in paragraphs 7 to 14 have addressed this issue. The said paragraphs are reproduced below:

"7. The order impugned in the appeal was passed by a learned Single Judge of this Court on December 20, 2016 in W. P. 13043 (W) of 2009. The petitioner challenged an order passed by the Director of School Education, West Bengal by which his claim for the benefit of two additional increments by virtue of having acquired doctorate degree, was rejected.

8. The sole reason for rejecting the petitioner's claim for two additional increments was with reference to West Bengal Schools (Control & Expenditure) Act, 2005 and the provisions contained therein. The learned Single Judge observed that since

the basis of the petitioner's case was for ROPA 1998 his claim could not be hit by the said Act. Since the Court did not find any application of the said Act to bar the claim of the petitioner the Court set aside the impugned order and directed the respondents to grant two additional increments from the date of convocation in which the petitioner received his Ph.D degree.

9. If the order impugned in the writ petition was not sustainable for rejecting the prayer of the petitioner on the basis of an Act the order impugned in the appeal is also not sustainable for a very different reason. The learned Single Judge before directing the respondents to pay two additional increments to the petitioner ought to have been satisfied about the basis of his claim and whether that could be allowed in the facts of the present case.

10. The petitioner was pressing his claim on the basis of Rule 12(5) of ROPA 1998. All that the petitioner is required to satisfy is that that clause had made him entitled to ask for two additional increments when the doctorate degree was awarded to him. In the present case, the convocation was held on December 15, 2006, by that time ROPA 1998 has ceased to be in operation. ROPA 2009 which later on came to be effective with effect from January 1, 2006 does not contain any such provision of law.

11. Rule 12(5) of ROPA 1998 entitles the holder of a doctorate degree to ask for the benefit of two additional increments from the date of convocation when the convocation was held ROPA 1998 had ceased to exist. Without a corresponding provision in the new ROPA a Division Bench of this Court by a judgment and order dated April 5, 2019 in the case of State of West Bengal & Others vs. Goutam Ghosh and Others (FMA 2368 of 2015) observed that since the Rule had ceased to exist on the

day the degree was awarded the petitioner must be held to be ineligible to the benefit claimed by him under ROPA 1998.

12. This aspect has not been discussed by the learned Single Judge at all. The order impugned in the writ petition was ultimately right, as the petitioner was not entitled to the benefit of two additional increments, though the reasons recorded therein were not correct.

13. At this stage Mr. Barua submitted that the appellant had exercised option under ROPA 1998. If that be so his scale of pay should be fixed under ROPA 1998 and under ROPA 2009.

14. We find sufficient substance in the appeal filed by the appellants. The judgment and order of the learned Trial Judge is set aside."

68. Mr. Advocate General has submitted that the aforesaid view is the correct enunciation of the law and needs to be accepted. It is submitted that no vested right is created in favour of a person to be continued to be granted incentives under any previous policy of a State.

Submission of Mr. Biswarup Biswas, learned Sr. Counsel on behalf of the appellant in FMA 557 of 2007

69. Mr. Biswarup Biswas the learned Senior Counsel in FMA 557 of 2007 has submitted that the appellant obtained her graduation in Physical Education from the University of Calcutta in the year 1998. Thereafter, she obtained Post Graduate Degree in Physical Education in the year 2001 from Kalyani University. She was selected for the post of Physical education teacher through the regular recruitment process conducted by the West Bengal School Service Commission in the year 1999. At the time of her

appoint on 28th March, 2001 to Sinthi Ramkrishna Sangha Vidyamandir (Girls) as a Physical Education teacher as a pass graduate candidate she joined the post as assistant teacher in physical education subject in the school on 24th April, 2001. After obtaining Masters in Physical Education (part-II examination) on 21st September, 2001 she applied for higher pay scale on 24th January, 2004. It was however, denied by the State. She filed a writ petition being W.P. No 7291(W) of 2006 which was dismissed by an order dated 10th April, 2006 upon observing that in view of the provisions of Sections 14, 16 and 20 of the West Bengal Schools (Control and Expenditure) Act, 2005 she was not entitled to higher scale of pay on acquiring higher degree.

70. However, in an appeal being FMA No. 557 of 2007 (***Baishali Banerjee Vs. State of West Bengal & Ors.)*** the Hon'ble Division Bench allowed the appeal *inter alia,* on the following reasons:

> *"8. The case in hand is, however, having a salient feature. The appellant is a Physical Education teacher. There is no honours course taught by any of the Universities in the State. Hence there could be no such category in the School Service Commission in the concerned subject. We also do not find any such distinction being made in Physical Education by the School Service Commission. Hence all candidates who are having appropriate qualification in Physical Education are considered in one category i.e. pass category. If that be the position their subsequent acquisition of post graduate qualification cannot be equated with any other subject.*

9. In the instant case the appellant undertook post graduate study. She appeared in the post graduate examination. Before the result could be published she was selected and appointed in the post. In the case of Bhaskar Chakraborty (supra) the identical situation happened. Hence in our view, the appellant was entitled to the benefit of the higher pay scale.

10. Let us now examine the said Act of 2005 to find out whether there is any hindrance in the way of extending higher pay scale to the appellant. Appellant was appointed in 2001. She acquired post graduate qualification in 2001. Hence she was to be considered contemporarily. Her case was unnecessary kept pending. Her prayer could not be considered to her disadvantage under the provisions of the said Act of 2005 in this regard. Learned Counsel appearing for the appellant has successfully drawn our attention to Section 16 wherein it is provided that notwithstanding anything contained in the said Act, the terms and conditions of service of a teacher shall not be varied to his or her disadvantage in the view of the commencement of the said Act.

11. In Circular dated June 03, 2002 the State considered the cases of the candidates who were undergoing post graduate studies or had appeared at the post graduate examination but result was yet to be published. Those candidates, if selected, in honours category were extended post graduate scale after acquiring post graduate qualification. Since in Physical Education there is no such distinction between pass category and honours category the benefit of the circular dated June 03, 2002 should be extended to the Physical Education teachers being similarly circumstanced with Bhaskar Chakraborty (supra) and the present appellant." (emphasis supplied)

71. The learned Counsel has also referred to a circular of the School Education Department Secondary Branch dated **22nd November, 1993** intimating that the date of effect for granting of the benefit of higher scale of pay i.e. pass graduate scale of pay for assistant teachers of physical education under ROPA 1990 would be with effect from 1st January, 1986 or date of improvement of qualification whichever is later in terms of para 16(3) of **G.O. No.33- Edn(B**) dated 7th March, 1990 as amended by **G.O. No.401-Edn(B)** dated 10th September, 1991 and **216-Edn(B)** dated 13th May, 1992 and not from 22nd November, 1993 as stated in the department's **Memo No.795-Edn(S**) dated 22nd November, 1993.

72. The learned Counsel has submitted that earlier on 8th March, 2000 a circular was issued by the School Education Department in clarification of paragraph 3 of the Government Order No.795-Edn(s) dated 22nd November, 1993 by which the benefit of higher scale of pay was extended to those physical education teachers who have obtained such degree on completion of two years regular course from a recognized university. Subsequently, the State considered the cases of the candidates who were undergoing post graduate studies or had appeared at the post graduate examination but result was yet to be published in its circular dated 3rd June, 2002. The government issued the circular of that date clarifying that those candidates if selected in honours category would be extended post graduate scale after acquiring post graduate qualification.

73. The learned Counsel submits that since in physical education there was no such distinction between pass category and honours category

the benefit of circular dated 3rd June, 2002 is required to be extended to the physical education teachers being similarly circumstanced with ***Bhaskar Chakraborty v. State of West Bengal*** (**WP. 2326 (w) of 2002)** and the present appellant.

74. The learned Counsel has submitted that Tarak Chandra Roy (*supra)* is in relation to a post graduate degree holder in physical education. Tarak obtained his masters in physical education in the year 1998 and appointed in the year 2003 prior to the coming into force of The Control and Expenditure Act, 2005.

75. However, the Hon'ble Division Bench dismissed the appeal upon the consideration of Section 14 of the 2005 Act, which is impermissible because of the fact that the 2005 Act has no retrospective operation and it has come into effect only on 26th December, 2005. Tarak has been appointed as assistant teacher in 2003 with post graduate degree. Therefore, the circular dated 22nd November, 1993 and 8th March, 2000 had no manner of application in view of the circular dated 3rd June, 2002 and the decision in ***Bhaskar Chakraborty*** *(supra).*

76. Mr. Biswas further submits that since section 16 of the West Bengal Schools Control of Expenditure Act 2005 preserves the previous rights in the limited manner as specified therein and hence Section 20 of the said Act cannot be interpreted to have any overriding effect in respect of entitlement of Post Graduate scale of pay in terms of ROPA RULES 1981, 1990 and 1998 respectively. Therefore Section 20 of the Act of 2005 has no

manner of application in the matter of curtailing any right that the writ petitioner/appellant had under the relevant clause of the earlier regulations. In support of the same Mr. Biswas has relied on a single Bench decision of this Hon'ble High Court in the case of ***Trilachan Jana VS State Of West Bengal*** reported in 2008 (2) WBLR 913 (paragraph 9 to 11).

77. Mr Biswas argues that the staff pattern of the school does not have any nexus with the entitlement of the post graduate scale of pay. The grant of scale relatable to qualification to one teacher and denial thereof on the anvil of different qualification to another teacher who is teaching the same subject in the same class in the same school or in different aided recognised Non-Government schools or Government sponsored Schools under the same Education Directorate would violate the principle of equal pay for equal work and offend Article 14 of the Constitution of India. In support of his submission he relies on a single bench decision in the case of ***Sampa Sahu (Mondal) v. State Of West Bengal***, reported in 2009 (1) C.LJ (CAL) (paragraph 21 to 27):

> *"(21) The staff pattern of Schools including Madrashas were, at all material times governed by Government Circulars and/or Orders issued in this regard from time to time. The relevant Government Orders indicate that qualifications for the same teaching post were to be fixed percentage wise. Out of two posts of Language Group teachers in a Junior High School, the minimum requisite qualification for one post was Pass Graduate and the minimum requisite qualification for the other Honours Graduate/Masters degree. When additional posts were sanctioned, the same percentage ratio was maintained. Thus, if*

a School was sanctioned two posts of Bengali Teachers who were required to teach Bengali in the same classes, the minimum requisite qualification for one post could be Pass Graduate and the minimum qualification for the other post could be Honours/Masters degree in Bengali.

(22) There were teaching posts in Junior High Schools/Madrasahs for which the requisite qualification was Pass Graduate and there were teaching posts, also, in Junior High Schools/Madrasahs for which the minimum qualification was Honours Graduate and/or Post Graduate degree. The fixation of a higher qualification for some posts and lower qualification for others, apparently had nothing to do with the teaching duties pertaining to the post, at least at the material time.

(23) It also appears that although there has recently been some change in the rules of appointment through the School Service Commission, at the material time, Honours Graduates and Pass Graduates had to compete in a common selection test.

(24) In the aforesaid circumstances, the payment of scale pertaining to qualification to one teacher and denial of scale pertaining to qualification to another teacher, teaching the same subject in the same class in the same school or in different aided recognized Non-Government schools would violate the principle of equal pay for equal work and offend Article 14 of the Constitution of India.

(25) If the minimum requisite qualification for some posts of Assistant Teachers of Language Group was B. A. (Honours) and/or M. A degree, the minimum qualification for the teaching post for the aforesaid category could have to be deemed as B.A. (Honours)/M.A. degree.

[26) Mr. Bhattacharya, learned Advocate appearing on behalf of the State cited a Division Bench judgment of this Court in Tarak Chandra Roy v. State of West Bengal and Ors., reported in 2008(2) Calcutta Law Times 240 (HC).

(27) In the aforesaid case, the Division Bench was of the view that after the enforcement of the West Bengal School Service Commission Act, 1997, the circulars dated 22nd November, 1993 and 8th March, 2000 pertaining to teachers of Physical Education had no manner of application." (emphasis supplied)

78. Mr Biswas submits that the School Education Department has issued a notification. No. 593-SE (B) dated 27th November, 2007 to modify the Section 14 (3) Of the West Bengal (Control of Expenditure) Act, 2005, as well as G.O. No. 1595 dated 26th December, 2005. However, the said assent of the Hon'ble Governor and never published in the Official Gazette and therefore it can be treated only as an administrative order or instruction and does not have any statutory force. The said notification cannot modify the statutory rule and the Government Order dated 26th December, 2005. The notification dated 27th November, 2007 appears to have been issued in derogation of the 2005 Act and the Government Order dated 26th December, 2005 and hence cannot be enforced.

79. The learned Counsel has relied upon the document filed as "Information related to **Memo No.12-SE/RTI/BS-631/2018** dated 4th January, 2019" issued by Assistant Secretary School Education Department, Government of West Bengal in response to a RTI that the available record of the Department does not reveal that notification/circular

No. 593-SE (B) dated 27th November, 2007 has been published in 'Kolkata Gazette Extraordinary'.

80. The said notification issued in exercise of power conferred under the West Bengal Schools (Control of Expenditure) Act, 2005. However, it has not been notified in the Official Gazette and the notification/ circular dated 27th November, 2007, does not have the assent of the Hon'ble Governor and therefore the said notification/ circular is only an Administrative order or instruction and does not have any statutory force. The said notification cannot modify statutory rule of the Government Order dated 26th December, 2005. The notification dated 27th November, 2007 has been issued in derogation of the statute and cannot be enforced. The learned Counsel relied on a document filed as "Information related to Memo No.12-SE/RTI/BS-631/2018 dated 4th January, 2019" issued by Assistant Secretary School Education Department, Government of West Bengal in response to a RTI that the available record of the Department does not reveal that notification/circular No. 593-SE (B) dated 27th November, 2007 has been published in 'Kolkata Gazette Extraordinary'.

81. The learned Counsel has relied on Division Bench decision rendered in the case of ***Akhtar Hossain Chowdhury v. STATE OF WEST BENGAL***, reported in **2013 2 CHN 632** (paragraph 14 to 16) to buttress his submission that that a circular cannot override the statutory provisions.

Submission of Mr. Subir Sanyal, Sr. Advocate on behalf of Archana Pramanik and Manas Kumar Ghorai.

82. Mr. Subir Sanyal the learned Senior Counsel appearing on behalf of the respondent/writ petitioners ***Archana Pramanick and Manas Kumar Ghorai*** in FMA No.143 of 2022 and FMA 125 of 2022 respectively has submitted that the condition of prior permission of the authority competent to grant permission in respect of a teacher who has been appointed to WBSSC in Honours/Post Graduate Teacher Category for improvement of his qualification of post graduate degree after joining the post to make himself or herself entitled to draw pay scale of a post graduate teacher as per Clause (c) of the **Order No.1595 SE(S)** dated 26th December, 2005 under Section 14(3) of the Act of 2005 is illegal, arbitrary, unreasonable and violative of Article 14 of the Constitution of India.

83. Mr. Sanyal submits that in order to appreciate the aforesaid argument it is necessary to refer to the ROPA Rules from 1981 to 2009 and the provisions of the West Bengal School Service Commissions Act, 1997 and the Rules framed thereunder as also the West Bengal Schools (Control of Expenditure) Act, 2005.

84. Mr. Sanyal submits that ROPA 1981 was formulated after careful consideration of the recommendation by the Governor with regard to the entitlement of the teaching and non-teaching staff of the sponsored/aided institution to draw pay in the revised scale of pay as shown in column 4. It provides for issuance of separate order regarding fixation of pay in the revised scale of pay on the analogy of the State Government Rules. Clause 4 stipulates that all orders issued by the Education Department regulating the conditions of service of the employees

and the pay scales of the posts shown in the annexure of the said order shall be effective subject to the provisions of this order. Clause 6 provides for exercise of an option either to retain existing scale of pay with existing terms and conditions of service or to come under the revised scale of pay together with the revised terms and conditions of the service as may be determined by the State of West Bengal.

85. The ROPA 1981 also provided for higher pay scale for teachers of secondary school in future only upon obtaining higher qualification in the subject relevant to their teaching/appointment.

86. Mr. Sanyal has referred to **Order No. 492 (6)-Edn(B**) dated 26th October, 1981 issued by the Order of the Governor in pursuance of paragraph 3 of **Memorandum No. 372-Edn(B)** dated 31 July, 1981 by which the pay of the teaching and the non-teaching staff of the non-government/sponsored/aided educational institutions and other organisations was fixed in the revised scale of pay as sanctioned in the government order dated 31st July, 1981.

87. It is submitted that Clause 4 provides for exercise of option and in Clause 4(3) it is made clear that once option is exercised it shall be final and cannot be modified at subsequent date.

88. It is submitted that Clause 5 provides for benefit of next higher scale of pay in certain contingency, namely, teacher who has not got single promotion or appointment in any higher grade in the same post even after completion of 8 years continuous and satisfactory service. They shall be

placed in the next higher scale of pay as shown in Annexure-II of **G.O. No. 372-Edn(B**) dated 31 July, 1981.

89. Clause 6 provides for stagnation of pay and Clause 7 provides for pay fixation on promotion or appointment.

90. The **Memorandum No. 372-Edn (B)** dated 31st July, 1981 namely, ROPA 1981 refers to annexure- I which, *inter alia,* stipulate for higher scale of pay on qualification without any restriction to all existing secondary school teachers upon improvements of qualifications relevant to their teaching subject.

91. The aforesaid provision was amended by **Memorandum No.52-Ed(B**) dated 14th February, 1992 to the effect that the words "all existing secondary school teachers" were substituted by the words "who entered service with higher qualifications or.....". Mr. Sanyal has referred to Note Clause 2(b) of the annexure to the ROPA 1981 to show that all existing Secondary School Teachers who have improved their qualifications not relevant to their teaching subjects will be allowed the higher scale on qualification basis after five years' teaching counting from the date on which higher qualification was obtained.

92. By Government **Notification no. 400-Edn(B)** dated 10th September, 1991 the above Clause-(b) was substituted by the provision "all existing secondary school teachers who were appointed with higher qualifications in subjects not relevant to their teaching or who improve their qualifications subsequent to their appointment in subject not relevant to

their teaching will be allowed the higher scale on qualification basis with effect from 1 April, 1991 or after 5 years teaching counting from the date on which higher qualification was obtained whichever is later".

93. It is submitted that a close scrutiny of the provisions of **Memorandum no. 372-Edn(B)** dated 31 July, 1981 read with later circulars issued by the Governor in exercise of power under proviso to Article 309 of the Constitution of India in the Rules creates a right of entitlement in favour of an existing school teacher either upon obtaining higher qualification or at the time of entry in service with higher qualifications relevant to the teaching subject for higher scale on qualification basis without any restrictions and also for obtainment of higher qualification not relevant to the teaching subject after 5 years. Entitlement of higher scale is thus linked with the qualification and this is not an incentive. This is one of the terms and conditions of the service as per the aforesaid order of the Governor issued in exercise of power under the proviso to Article 309 of the Constitution of India.

94. Similarly, the benefit of next higher scale of pay in certain cases, stagnation of pay, pay fixation on promotion or appointment as provided for in Government **Order No. 492(6)-Edn(B**) dated 26.10.1981 formed part of the terms and conditions of service having been issued by the Governor in pursuance of **Memorandum no. 372-Edn(B)** dated 31 July, 1981. Therefore, they were and are enforceable rights.

95. It is submitted that even if it is held that the benefits of next higher scale of pay in certain case, stagnation pay, pay fixation on promotion or appointment as aforesaid are incentive, even then those benefits are enforceable as they form part of the terms and conditions of service as per **G.O.No. 372-Edn(B)** dated 31 July, 1981.

96. Mr. Sanyal refers to ROPA 1990 and submits that proviso to Clause 5 of ROPA 1990 provides for exercise of option at the discretion of the employees for retaining existing scale of pay with existing condition of service or for coming over to the revised scale of pay to the revised terms and conditions of service as may be determined by the Government.

97. Mr. Sanyal submits that Clause 16 (1) provides for placement in the next higher scale of pay while his designation remaining unchanged and who has not got a single promotion/advancement to a higher scale in the same posts even after completion of 18 years of continuous and satisfactory service.

98. Clause 16(2) thereof makes a member of the teaching and non teaching staff entitled to an additional increment in the revised scale of pay for every 10 years of continuous and satisfactory service counted form the date of appointment subject to a maximum two such increment in addition to benefit under sub-para (1).

99. Clause 16 (3) provides for higher scale of pay appropriate to their qualification for all teacher and librarians of secondary schools who have improved/will improve their qualification or were appointed with higher

qualification in the subject or group relevant to their teaching /appointment with effect from 1 January, 1986 or the date of improving qualification whichever is later.

100. Clause 16(3) as above was substituted by way of amendment vide **Memorandum No. 401-Edn(B)** dated 10 September, 1991 issued by the Governor to the following effect:

> *"All teacher and librarians of secondary schools who improve their qualification in subjects relevant to their teaching/appointment shall get higher scale of pay appropriate to their qualification with effect from the date of improving qualification".*

101. A bare reading of ROPA, 1990 issued by the Governor in exercise of power under proviso to Article 309 of the Constitution of India contains Rules providing for the revised scales of pay, age of superannuation, retirement benefits and other terms and conditions of service as enumerated therein. Therefore, entitlement of higher scale of pay appropriate to the qualifications of teachers and librarians of secondary schools who have improved or will improve their qualification or were appointed with higher qualification in subject or group relevant to their teaching criterion is one of the terms and conditions of service as per the Rules, (ROPA, 1990). Entitlement to the higher scale of pay is thus linked with qualification and an enforceable right, not an incentive. This is earned by acquisition of higher qualification which ultimately ensures to the benefit of the educational institution and the students.

102. Benefit of placement in the next higher scale of pay upon completion of 18 years continuous satisfactory service for not having a single promotion or advancement to a higher scale in the same post also forms part of the terms and conditions of service as per the Rules i.e. ROPA 1990 and the same is enforceable right in law. If it is at all held to be an incentive, even then the same is enforceable right in law for making it a part of the terms and conditions of service. Moreover, it is a beneficial provision allowing advancement or promotion in the higher scale upon 18 years continuous and satisfactory service and cannot be taken away, by executive whims.

103. Mr. Sanyal submits that ROPA 1998 contained Clause 12(3) similar to Clause 16(3) of ROPA 1990 entitling teachers to higher scale of pay who have improved or will improve their qualification or who were appointed with higher qualification in the subjects or groups relevant to their teaching or appointment with effect from 1st January, 1996 or the date of improving qualification whichever is later.

104. Like the ROPA, 1990 the subsequent ROPA 1998 also provides for a condition of service entitling a teacher to a higher scale of pay linked with his qualification and is enforceable in law.

105. It is submitted that Clause 12(1) and (2) of ROPA 1998 are similar to Clause 16 (1) and (2) of ROPA 1990.

106. Mr. Sanyal has referred to Section 9 and 10 of WBSSC Act, 1997 to emphasise that the terms and conditions of a service of teaching

and non-teaching staff shall not be varied to their disadvantage, insofar as such terms and conditions related to the appointments of such teachers to the post held by them immediately before commencement of the Act. Moreover, their service has been guaranteed under ROPA 1990 entitling higher scale of pay on acquisition of higher qualification which has been retained and reiterated.

107. Mr. Sanyal has referred to the **Memorandum No.155-SE(B**) dated 13th July, 1999 by which amendment was made to Clause 12(3) of ROPA 1998 by way of substitution to the effect that ".....such higher qualified teachers in the relevant subjects or group is justified as per approved staff pattern of the school, if such teachers is appointed through WBSSC, his/her pay will be fixed in the scale of pay as per his/her qualification mentioned by the West Bengal School Service Commission".

108. It is submitted that **Circular No.735-SE(S**) dated 3rd June, 2002 issued by the School Education Department, Government of West Bengal purportedly amending **Memorandum No.155-SE(B)** dated 13th July, 1999 amending **Memorandum No.25-SE(B**) dated 12th February, 1998, has included and thereby widened the scope of **Memorandum No. 155-SE(B)** dated 13th July, 1999 to the effect that Honours graduate teachers appointed through WBSSC who have completed their course of studies at post graduate level in the subject relevant to their appointment or have appeared at the examination but result of that examination was not published till the date of their joining would be allowed scale of pay with

effect from the date of joining or the date following the last date of examination whichever is later.

109. Subsequently, Government **Order No.1334-SE(**S) dated 3rd November, 2004 was issued by the School Education Department, Government of West Bengal for determination of the date from which post graduate scale will be allowed to eligible teachers on acquiring of post graduate degree in partial modification of **G.O.No. 735-SE(S)** dated 3rd June, 2002 to the following effect:-

i. Honours graduate teachers of Hons./Post Graduate category appointed through WBSSC who obtained post graduate degree in subject relevant to their appointment prior to their joining shall be eligible for post graduate scale of pay from the date of joining.

ii. The Honours graduate teachers of Hons./Post Graduate category who have completed their examination before joining but results were published after joining be eligible to post graduate scale of pay from the date of publication of result.

iii. Honours graduate teachers of Hons./Post Graduate category appointed through SSC who had improved or will improve qualification after joining the post with due permission from the authority competent to issue such permission, be eligible for post graduate scale on successful results of last examination leading to post graduate degree from the day following the last day of examination.

110. It is submitted that point No.(iii) is discriminatory, illegal and violates Article 14 of Constitution of India having no intelligible differentia and no nexus with the object to be achieved.

111. Mr. Sanyal has referred to Section 5(1) and 5(3) and 14 of the Control of Expenditure Act, 2005, and **Order No.1595-SE(S)** dated 26th December, 2005 and highlighted the circumstances entitling a teacher to a higher grade scale and additional increment under Section 14(3) of the Act, 2005.

112. Mr. Sanyal submits that **Order No. 1595-SE(S)** dated 26th December, 2005 specified the following circumstances where an Honours or Post Graduate Scale of Pay can be claimed by a teacher:

> a. prior to his joining has acquired post graduate degree in the subject relevant to the appointment be entitled to pay of post graduate teacher category from the date of joining the post or
>
> b. completed examination for post graduate degree, prior to joining the post, in the subject relevant to the appointment, but the results of such examination published after joining the post shall be entitled to draw pay of post graduate teacher category from the date of publication of result of such examination.
>
> c. improved his or her qualification after joining the post with prior permission of the authority competent to grant such permission, on being successful in the results of the examination for the post graduate degree in the subject relevant to the appointment, be entitled to draw post graduate teacher category from the day next following the last date of such examination.

113. In referring to **Order No.593-SE(B)** dated 27th November, 2007 Mr. Sanyal submits that the said order specified the manner in which a teacher would be entitled to claim an additional increment or higher scale of pay under Section 14(3) of the 2005 Act. The salient features are:

i. Teacher to take prior permission from the Managing Committee to enrol themselves or to appear for any examination for enhancement of educational qualification.

ii. Teacher to apply for leave/special leave/study leave with resolution of Managing Committee to the WBBSE through MC of School.

iii. to seek prior permission of D.I. of Schools if he or she wants to claim additional increment or higher scale of pay for obtaining such higher qualification through MC of School.

iv. No such permission to be granted on any ground to a teacher who entered service or joined the school with graduate degree with scale of pay.

v. Courses to be studied should be relevant to the subjects studied in under graduate honours/post graduate course of the applicant teacher and none other.

vi. Prayer from teachers who had already secured higher qualification observing above procedure and submitted claim to concern D.I. of Schools with complete set of papers may be considered only by D.I. of Schools with approval of DSE, W.B. only after examination of the staff pattern, vacancy position of the school.

vii. No prayer for higher scale of pay from graduate degree teacher with graduate scale of pay at the time of entry into service /joining the school will be entertained. No matter whether he or she has

secured such higher qualification before or after in introduction of Act of 2005.

viii This order will replace all earlier orders published before coming into force of the Act of 2005 and also modifies the order No. 1595 dated 26th December, 2005.

114. Curiously, **Order No. 1595-SE** dated 26th December, 2005 was issued by the Governor in exercise of power under Sub-Section 3 of Section 14 of the Act of the West Bengal School (Control and Expenditure) Act, 2005 and such order of the Governor is being modified by an executive **Order No.593-SE(B)** dated 27th November, 2007 by order of the Joint Secretary, School Education Department, Government of West Bengal and not by the Governor in exercise of His power. This action is impermissible and therefore the **Order No. 593-SE(B)** dated 27th November, 2007 is illegal, unlawful and nonest in the eye of law.

115. Condition to obtain prior permission of the authority competent to grant such permission in respect of a teacher who has been appointed through WBSSC in Honours/Post graduate teacher category for improvement of his qualification of post graduate degree after joining the post to make himself or herself entitled to draw pay post graduate teacher category as per Clause (C) of the **Order No. 1595 SE(S)** dated 26th December, 2005 issued by the Governor under Section 14(3) of the Act of 2005 is illegal, arbitrary, unreasonable and violative of the provisions of Article 14 of the Constitution of India and the provisions of Section 14(3) of the Act of 2005 for the following reasons:

i. The object of the order is to put the same classes of person on the same pedestal for being selected by competing with the post graduate degree candidates on the same syllabus and same set of question papers in the examination conducted by the WBSSC and preparation of single panel in a subject from amongst both Honours degree candidates and Post Graduate degree candidates.

ii. As per Clause (a), a teacher who prior to joining acquired post graduate degree would be automatically entitled to draw post graduate teacher category from the date of joining the post without consideration to staff pattern, vacancy position etc.

iii. As per Clause (b); a Teacher who, prior to joining the post, completed the examination for the post graduate degree in the subject relevant to the appointment but result of such examination published after joining would be entitled to draw pay at post graduate teacher category from the date of publication of result without any consideration to staff pattern, vacancy position of the school etc.

iv. There is no intelligible differentia and basis for putting (a) and (b) classes of teachers in one category and that of (c) classes of teachers in a different category though they stand on the same footing. It constitutes violation of Article 14 of the Constitution of India.

v. Staff Pattern as per GO dated 4 September, 1998 stipulates for science category three teachers, subject to strength of students and sanctioned posts, one from pass category and two from Honours/Master degree category. Similarly, also in case of social science group and language group. Therefore, there is no distinction between Honours Graduate teacher and Master Degree/Post Graduate teacher. They are in the same category of post. This in consideration of above factors automatically entitles a teacher who obtained or improved higher qualification to higher scale of pay.

116. In view of the aforesaid Mr. Sanyal submits that the questions are to be answered in favour of the teachers.

Submission of Mr. Samaresh Chandra Dhara, Learned Counsel on behalf of the petitioner in WPA 4698 of 2016

117. Mr. Samaresh Chandra Dhara learned Counsel on appearing in WPA No.4698 of 2016 ***Subodh Kumar Biswas v. State of West Bengal & Ors.,*** adapts the submission of Mr. Subir Sanyal, Senior Advocate. It is submitted that the petitioner was duly appointed as an assistant Teacher in Bengali in Nasra High School, Ranaghat, post B.A. (Bengali). The appointment was approved with effect from 7th March, 1996 in view of the fact that the writ petitioner at the time of joining was having an M.A. Degree in Bengali. The school authority did not restrict the writ petitioner to take classes on the basis of an initial qualification, the petitioner was forced to take classes in the higher secondary section, the school has admitted that the petitioner has taken class in the high secondary section, however the petitioner was denied higher scale of pay on the basis of higher qualification although his service was utilised by the school authorities. The prayer for higher scale of pay was rejected by the District Inspector Schools, (SE) Nadia though the writ petitioner was permitted to take the classes in the higher secondary section only in view of his higher qualification and his services has been duly utilized by the school. In view of the above the writ petitioner is entitled to higher scale of pay for his higher qualification.

Submission of Mr. Kamalesh Bhattacharyya, Sr. Advocate on behalf of the Writ Petitioners in FMA No.387 of 2020

118. Mr. Kamalesh Bhattacharyya learned Senior Counsel representing ***Biswesswar Bera & Anr***., in FMA No.387 of 2020 has adopted the submission made by Mr. Subir Sanyal learned Senior Advocate of all the four issues. It is submitted that the respondent no.1 joined as Assistant Teacher with B.A. (Pass) in English on 2nd November, 1998 on the basis of the recommendation of Regional School Service Commission, Western Region. He passed M.A. Part-I and Part-II on the basis of the result published on 15th May, 1998 and 15th May, 2000 respectively and last date of examination for M.A. Part-II in English was 30th November, 1999. His prayer for post graduate scale was refused by District Inspector of Schools on 13th February, 2009 relying on Government order dated 27th November, 2007 and hence, the writ petition was filed.

119. The writ petition being ***W.P.No. 8411(W) of 2009*** was allowed by the Hon'ble Justice Debangshu Basak by which it was directed that benefit of post graduate scale should be disbursed to the petitioner by the concerned authority. Against the same F.M.A. 387 of 2020 has been preferred.

120. In addition to submission made by Mr. Sanyal it is submitted by Mr. Bhattacharyya that the Control of Expenditure Act was introduced in 2005. The teacher concerned has acquired the post graduate qualification in 2000 and at that point of time ROPA 1999 was in vogue and notification dated 12th February, 1999 was holding the field regarding awarding of post graduate scale on improvement of qualification irrespective of having

Honours Degree or Pass Degree in graduation level. Clause 12(3) of Memorandum dated 12th December, 1999 reads as follows:

> *"All teachers including Physical Education Teachers and Librarians of Secondary Schools who have improved/will improve their qualifications who were appointed with higher qualification in the subjects or groups relevant to their teaching/appointment shall get higher scale of pay appropriate to their qualifications, with effect from the 1st January, 1996 or the date of improving qualifications whichever is later."*

121. The aforesaid benefit was withdrawn from the respondent teachers by virtue of notification No. 155 dated 13th July, 1999 whereby it was clarified that benefit under circular dated 12th February, 1999 will be available provided such qualification is mentioned in the recommendation made by the School Service Commission. As a result the petitioner being a pass graduate and in spite of having M.A. qualification since 2000 she or he was not awarded post graduate scale of pay. In the staff pattern also the post graduate qualification was registered as teacher having post graduate qualification in the matter of filling up the vacancies in post graduate level excepting the pay disparity. The notification dated 13th July, 1999 is only an administrative order and it has no retrospective effect and as such the benefit as accrued in favour of a teacher by virtue of notification dated 12th February, 1999 cannot be divested by the subsequent notification dated 13th July, 1999 as it has no retrospective effect.

122. The question needs to be considered whether the teachers appointed before 2005 who improved their qualification after introduction of Control of Expenditure Act, 2005 can be denied the scale of pay pertaining

to their higher qualification on the ground of non-mentioning of such qualification by the School Service Commission in their recommendation. Mentioning of qualification in the recommendation of School Service Commission cannot be the sole criteria for determination of the pay scale of a teacher and any denial of higher pay or incentive against the higher qualification so acquired if it would result in utter discrimination amongst the same class of teachers who were enjoying such higher pay scale merely because they were appointed and improved their qualification prior to their recommendation by School Service Commission. The teachers having similar qualification have been treated unequally and discriminatorily by virtue of government instructions by way of administrative orders. The Control of Expenditure Act has no effect in respect of the appointment made and improvement of qualification made prior to 2005.

123. The order passed on 27th November, 2007 under **Memo No. 593** by the School Education Department also has no retrospective effect. It cannot regulate such class of teachers as that of the present answering respondents. In fact a total bar has been imposed on 27th November, 2007 with regard to grant of prayer for higher scale of pay from any teacher with graduate degree and graduate scale of pay at the time of entry into service, no matter such qualification was acquired before or after introduction of the Control of Expenditure Act 2005.

124. Mr. Bhattacharyya submitted that there cannot be a discrimination between a teacher with Honours degree and subsequently acquired post graduate degree and a teacher with an initial qualification of a

pass graduate and thereafter acquiring post graduate qualification, that is, B.A (Hon's) and M.A with B.A (pass) and M.A having regard to their nature of work. They cannot be treated separately as they would be discharging the same kind of work in the academic field.

Submission of Mr. Chaturvedi, Advocate on behalf of the writ petitioners in WPA 4698 of 2016

125. Mr. Chaturvedi appearing on behalf of the aforesaid writ petitioners while adopting the submission advanced by Mr. Sanyal has submitted that on the principle of equal pay for equal work the teachers who have acquired higher qualification in course of the employment should be treated at par with teachers who have entered the service with higher qualification as both of them have acquired such qualification through the same process of examination having same syllabus and would be discharging same kind of duties.

126. Mr. Chaturvedi submits that it is not unknown that schools due to paucity of qualified teachers sometime required the service of teachers who have acquired higher qualification after their appointments to take classes and as their capability to take classes by reason of their acquired knowledge cannot be doubted they can expect equal pay for equal work.

127. Mr. Chaturvedi has submitted that in fact the government in its Circular dated 27th January, 1995 have even permitted teachers who have obtained higher qualification in subjects not relevant to their respective subject or group in which they were appointed in schools but relevant to

their respective teaching subjects to draw according to their respective higher qualification subject to certain conditions being fulfilled.

128. Mr. Chaturvedi submits that once it is established that duties and responsibilities of these teachers who have acquired higher qualification during employment are similar and are discharging similar kind of job the benefit of higher scale of pay cannot be denied.

129. Mr. Chaturvedi submits that even temporary appointees are entitled to equal pay for equal work as held in ***Bhagwan Dass & Ors. v. State of Haryana & Ors.,*** reported in **1987(4) SCC 634.**

130. For all the above reasons, according to the respondents the reference of questions is fit for an answer to the effect that improvement of qualification by graduate teachers should not debar them from getting the post graduate scale particularly when such qualification was acquired prior to 2005 Expenditure, Act and the circular dated 13th July, 1999 is unconstitutional, arbitrary and is liable to be quashed.

Submission of Lina Mazumdar on behalf of the Writ Petitioner in WPA 29710 of 2013

131. Ms. Lina Majumdar, learned Advocate appearing on behalf of the writ petitioner has submitted that the writ petitioner is entitled to two additional increments on successful completion of Ph.D. Degree which was claimed in terms of Clause 16(5) of **G.O. No.33-Edn.(B)** dated 7th March, 1990 and Clause 12(5) of **G.O. No. 25-SE(B)/1M-102/98** dated 12th February, 1999. The aforesaid provision was entitled to two additional

increments who had acquired a Ph. D. Degree prior to coming into force of **G.O. No. 46-SE(B)/5B-1/2009** dated 27th February, 2009 would be entitled to two additional increments from the date when the provisional certificate was issued to Pampa Das on 8th May, 2005 as she acquired the Doctorate degree on that date. It is submitted that ROPA 2009 cannot stand in the way in granting incremental benefits to Pampa for her Ph. D degree as ROPA 2009 cannot have retrospectively effect from 1st January, 2006 i.e. after the date when the writ petitioner acquired Ph.D. Degree. The claim of the petitioner shall be governed by the provision of ROPA 1998.

Analysis and Conclusions

132. We now propose to decide the issues raised by the parties. The contentious issues are formulated in the order of reference, however, it hinges primarily on the entitlement of a teacher to a higher scale of pay upon acquiring higher qualification and if such issue is decided in the affirmative what would be the relevant date. Incidentally it also concerns the issue of incentives extended to teachers on acquiring higher qualification or under relevant government orders as CAS.

133. The learned Counsel for the parties has extensively referred to ROPA Rules since 1981 till 2009 in support of their respective claims. The main impediment, hurdle and obstruction appear to be the government order dated 13th July, 1999, the Control and Expenditure Act, 2005 and subsequent notification issued thereunder regulating pay scale and other financial benefits.

134. Section 14(3) of the 2005 Act has been interpreted differently by the learned Counsel in relation to ROPA Rules prior and subsequent thereof. On an over view of the rules starting from ROPA 1981 it appears that the government from time to time has altered and amended the eligibility criteria of teachers to claim higher scale of pay. The requirement to have the higher qualification in a relevant subject has a rational basis. The teacher appointed in a subject if he has acquired a higher qualification in course of his employment in the relevant subject is likely to benefit the institution and the students.

135. The authorities concerned shall not ordinarily deny such benefit to a teacher who has improved his qualification in the relevant subject during his service.

136. Under the ROPA 1981 the pay scale of the posts of the teachers would be as per the schedule mentioned in annexure I. The said Rule contains the following note as modified during 1981 and 1992:

> "**N.B.:**
>
> 1) All existing Secondary School teachers will be allowed annual increments in the revised scales of pay provided that untrained teachers will have to get themselves trained within 5 years from April 1981 failing which their increment will be stopped till they get themselves trained.
>
> 2. (a) All existing Secondary School teachers <u>who have improved their qualification relevant to their teaching subjects will get the higher scale on qualification basis without any restriction</u>;

(b) All existing Secondary School teachers who have improved their qualifications not relevant to their teaching subjects will be allowed the higher scale on qualification basis after five years' teaching counting from the date on which higher qualification was obtained;

(c) In future, school teachers will be allowed higher pay scale on qualification basis only when they obtain such higher qualification in the subject relevant to their teaching/appointment. (emphasis supplied)

[See the **Memo. Nos. 142-Edn. (B**) dated 17th May, 1985, **52-Edn. (B)** dated 14th February, 1992. **Memo. Nos. 253-Edn.(B)** dated 17th September, 1984 and **400-End.(B)** dated 10th September, 1991].

137. The Education Department, Government of West Bengal in pursuance of paragraph 3 of the Government **Order No.372-Edn.(B)** dated 31st July, 1981 laid down the principles for fixation of pay of the teachers and non-teaching employees, in short, fixation of pay and option form.

138. The said Rule provides for exercise of option and benefit of next higher scale of pay in certain contingencies. It makes clear that the option once exercised shall be final and cannot be modified at any subsequent date. The consequences of non-exercising option is mentioned in Rule 4(3) of ROPA 1981. The benefit of higher scale was made applicable only to those whose pay shall be fixed in the revised scales of pay shown in serial nos. 1 to 13 in annexure-II and only once in one's service career. It also takes care of stagnation pay in Rule 6 in relation to non-government employees whose pay has been fixed in the revised scales of pay shown in serial no. 1 to 13 of

annexure-II of Government **Order No.372-Edn(b)** dated 31st July, 1981 and who reached the maximum of the respective scales of pay would continue to draw increment beyond the maximum of the scale for 3 years at the rate of what was last drawn by him/her as increment before reaching the maximum. It thus, shows that such benefit of increment was for a limited duration notwithstanding the length of service.

139. At the time of exercising option the occupant of the post would be required to file an option form as prescribed in annexure I.

140. This was followed by ROPA 1990, actually effective from 1st January, 1988 but notionally effective from 1st January, 1996. The scale of pay of teachers and non-teaching staff was revised on the basis of the recommendation of the Pay Commission. It was published on 7th March, 1990. Similar provision with regard to option is mentioned in Clause 5 to be exercised within 90 days from the date of issue of the said order. However, a teacher or a non-teaching employee of a Government Aided/Sponsored educational institution who was in service on 31st December, 1995 may, at his discretion, retain existing scale of pay and existing terms and conditions of service. The option shall not be admissible to any employee to a post on/or after 1st January, 1996 for the first time in service.

141. The stagnation increment is provided in Rule 8. It states that an employee whose pay has been fixed in any of the revised scales of pay with the maximum of rupees four thousand or below and who reaches the maximum of the scale of pay shall continue to draw increment for

stagnation beyond the maximum of the scale for a period of three years at the rate last drawn by him as increment before reaching the maximum.

142. The significant provision in ROPA 1990 is introduction of Career Advancement Scheme (CAS) and related issues. Rule 16(3) provides for higher scale of pay to all teachers and librarians of secondary schools who have improved/will improve their qualifications or who were appointed with higher qualification in the subjects or group relevant to their teaching/appointment appropriate to their qualifications with effect from 1st January, 1986 or the date of improving qualification whichever is later.

143. Clause 3 of the aforesaid Rule was substituted by the Government Order dated 10th September, 1991 in the manner following:

> *(3) All teachers and librarians of secondary schools who <u>will improve their qualification in subjects relevant to their teaching/appointment shall get higher scale of pay appropriate to their qualification with effect from the date of improving qualification.</u>"* (emphasis supplied)

144. The substituted Clause would show that the qualification should be in relation to subjects relevant to their teaching and appointment and with effect from the date of improving qualification. He shall be placed in the next higher scale of pay, however his designation would remain unchanged. The CAS has further undergone a change in ROPA 1999 which became notionally effective from 1st January, 1996 and actually effective from 1st April, 1997. It was published on 12th February, 1999.

145. The additional two increments under the Rule 16(2) was modified by **G.O. No.38-SE(B)** dated 8th March, 1999 with the introduction of the following proviso which reads:

> *"Provided that the employees who have already got two additional increments in the earlier pay revision will not get increment further in the present revised scale and the employees who have drawn only one increment in the earlier revision for 10 (ten) years of service, will get one increment in the present revised scale after completion of 20 (twenty) years of service."*. (emphasis supplied)

146. However, on 13th July, 1999 sub-rule (3) of paragraph 12 was substituted and in the said substituted sub-paragraph the following proviso was added to the sub-paragraph:

> ".....provided that such higher qualified teachers in the relevant subjects or group is justified as per approved staff pattern of that school if such teacher is appointed through West Bengal School Service Commission, his/her pay will be fixed in the scale of pay as per his/her qualification mentioned by the West Bengal School Service Commission". (emphasis supplied)

147. Moreover at the end of paragraph 8 which refers to the date of increment in the Revised Scale the following line was inserted:

> *"increment in the revised scale of pay shall be drawn with effect from 1st day of the month in which it becomes otherwise due".*

148. By reason of the aforesaid amendment the entitlement to higher scale of pay now has to be justified as per approved staff pattern of that

school and if the appointment is through West Bengal School Service Commission then the pay will be fixed in the scale of pay as per his/her qualification mentioned by the West Bengal School Service Commission. In view of such substitution the staff pattern in respect of the relevant subject and qualification of the teacher mentioned by the West Bengal School Service Commission has now become relevant considerations.

149. However, there are few memoranda issued in between the time specified above which *inter alia,* includes Government **Order No.795** dated 22nd November, 1993 with regard to scale of pay to the teachers of physical education and Government **Order No.796** dated 22nd November, 1993 regarding higher scale of pay to the teachers and Government **Order No.57** dated 27th January, 1995 concerning granting of pay according to qualification to the assistant teachers of non-government Secondary Schools.

150. In the first government order mentioned above i.e. 22nd November, 1993 it has been clarified that all physical education teachers having Master Degree in physical education from recognised Universities will be entitled to higher scale of pay in relaxation of the earlier Government Orders.

151. The **Government Order No.796** of the same date clarified that all teachers in social science group and language and science group with higher qualifications of post graduate degree or equivalent in relevant subjects will get higher scale of pay in relaxation of the staff pattern

mentioned in the earlier government orders and would be made effective on and from the said date. The aforesaid two government orders thus emphasised and extended financial benefit to teachers for acquiring higher qualification in the relevant subject.

152. The government order dated 27th January, 1995 was in relation to granting of pay according to the qualification to the Assistant Teachers of Non-Government Secondary Schools allowing them higher scale of pay even if their initial appointments were in different group/subject and not to their respective subject/group in which they were appointed but relevant to their respective teaching subject in order to tide over the inconvenience caused to the educational institutions due to non-sanctioning of the required number of additional posts to the schools owing to financial stringencies. Considering such prevailing situation and in the academic interest of the schools it was provided that in the event such assistant teachers take individually at least six such periods per week as officially allotted by the authorities of the respective schools to such assistant teachers within the normal workload upon the written consent of the concerned teacher and with the prior permission of the concerned District Inspector of schools and strictly according to the actual academic need of the individual school, the teacher shall be allowed to draw salary according to their respective higher qualifications as prescribed by the State Government. Thus it allows a teacher who has obtained higher qualification in subjects not relevant to their respective subject or group in which they were appointed in schools but relevant to their respective teaching subjects to draw pay according to

their respective higher qualification. The pay structure should be determined on the basis of higher qualification. This was purely an interim arrangement.

153. The Government felt the necessity to constitute a specialised body to regulate recruitment of teachers a field, which had remained unregulated, undefined and open to misuse and manipulates of the Managing Committee and to bring transparency and uniformity in the recruitment process enacted the West Bengal School Service Commission Act, 1997, in short, “the 1997 Act”.

154. The 1997 Act was enacted to provide for the constitution of Regional School Service Commissions and a Central School Service Commission in the state. It defines in Section 2(p) a “teacher” to mean an assistant teacher or any other person holding a teacher post of a school and recognized as such by the Board or the Council or the Board of Madrasah as the case may be and includes the headmaster or the headmistress. The Act requires the Managing Committee to appoint teachers on the recommendation of the Regional Commission having jurisdiction. It is the duty of the Regional Commission to select persons for appointment to the posts of teacher in schools within its territorial jurisdiction.

155. Section 17 of the 1997 Act lays down the rule making power of the State Government.

156. The manner and procedure for selection of persons for appointment to the posts of Teachers shall be such as may be prescribed.

The Act makes it very clear that any appointment of a teacher made on or after the commencement of the 1997 Act dehors the provisions of the Act shall be invalid.

157. On 3rd October, 1997 the School Service Commission Rules has come into force.

158. The aforesaid rules were framed in pursuance of Section 17(2) of the 1997 Act. Section 17(2)(d) deals with the manner and scope of selection of a person for appointment to the posts of teachers under Sub-Section 1 of Section 8. Rule 7 requires the School Education Department to lay down the procedure for recruitment of teacher, headmaster and head mistress including *inter alia,* the essential and/or desirable educational and other qualifications, age, experience and other requirements. Sub Rule 2 requires every school to report the vacancies as on the date of report as may arise up to the second day of next January to the Regional Commission with a copy to the District Inspector of Schools (Secondary Education).

159. The manner of distribution of staffs in different groups in schools is laid down in the Government **Order No.670** dated 4th September, 1998. The said government order has clearly defined the distribution of teaching staff in the Recognized non-Government Junior High School, Junior High Madrasah, High School, High Madrasah and High Secondary Schools (normal section).

160. The said circular cancels the earlier Government **Order No.642-SE(S)/vide no.1S-14/98** dated 20th August, 1998. It clarifies that Classes V to X in higher secondary school would be treated as normal section.

161. On 8th March, 2000 the School Education Department issued a circular in clarification of paragraph 3 of the Government **Order No.795-Edn(s)** dated 22nd November, 1993 granting benefit of higher scale of pay to those physical education teachers who have obtained M.P.Ed. Degree on completion of 2 years regular course from a recognised University.

162. In view of the fact that Honours Graduate candidates have to compete with Post Graduate candidates in the test held by WBSSC and a single panel is prepared by WBSSC for the two sets of degree holders, on 3rd June, 2002, the government issued the **Order No.735-SE(S)/SP-132/2002** clarifying that Honours Graduate teachers of Non-Govt. aided Secondary Schools including Madrasahs appointed through W.B.S.S.C. who have "obtained post graduate degree in the subject relevant to their appointments prior to their date of joining in the school/Madrashas or who have completed their course of studies at Post Graduate level in the subject relevant to their appointment or have appeared at the examination but result of that examination was not published till the date of their joining may be allowed higher scale of pay with effect from the date of joining or the date following the last date of examination (both theoretical and practical) whichever is later". (emphasis supplied)

163. The School Education Department subsequently revised the aforesaid circular by **Circular No. 134-SE(S)** dated 3rd November, 2004 as presumably it faced difficulties in determining the date from which Post Graduate scale would be allowed to the eligible teachers on acquiring Post Graduate degree. The Government Order dated 3rd June, 2002 was replaced by the following paragraph:

> *"Upon due consideration of the above facts the Government in School Education Department has decided that Hons. Graduate teachers of Hons./Post Graduate category of Non-Govt. Secondary Schools including Madrasahs appointed through West Bengal S.S.C. who obtained post graduate degree in subject relevant to their appointment prior to their joining in school/Madrasahs shall be eligible for Post Graduate scale of pay from the date of joining. The Hons. graduate teachers of Hons/Post Graduate category who have completed their examination before joining but results were published after joining shall be deemed to have been eligible to get the Post Graduate scale of pay-from the date of publication of results of such Post Graduate degree relevant to their appointment. The Hons, graduate teachers of Honours/Post Graduate category of Non-Govt Secondary aided schools including Madrasahs appointed through S.S.C. and who have improved or will improve qualification after joining the posts with due permission from the authority competent to issue such permission, be eligible for Post Graduate scale on successful results of the last examination leading to the Post Graduate degree relevant to their appointment from the day following the last date of the examination (both theoretical and practical). The other paragraphs and sentences of the G.O. remain unchanged. This will come into force with immediate effect."* (emphasis supplied)

164. In view of the aforesaid Clause Honours graduate/Post graduate teachers (i) who obtained post graduate degree in the relevant subject prior to their joining would be entitled to post graduate scale of pay from the date of joining, (ii) who have completed their examination before joining but results were published after joining shall be deemed to have been eligible to get the post graduate scale of pay from the date of publication of results of such post graduate degree, (iii) who have improved or will improve qualification after joining the posts with due permission from the authority competent to issue such permission would be eligible for post graduate scale on successful results of the last examination leading to the post graduate degree from the day following the last date of the examination (both theoretical and practical).

165. In order to regulate and exercise control over the Expenditure in the schools in West Bengal, the West Bengal School (Control and Expenditure) Act, 2005 has been enacted. The said Act was notified on 19th August, 2005.

166. The statement of object and reasons of the 2005 Act clearly defined and sets out in detail the reason for enactment of the said Act. The Government felt that the creation of post, approval of panels, appointment of teachers, regularization of service of teaching and non-teaching staff, sanctioning of higher scale to teachers on account of acquiring higher qualification in the Schools and the Madrassahs in the State of West Bengal and recognition and up-gradation, and expenditure for management requires to be streamlined by a separate statute. The reason being that

administrative orders, directions and circulars that were in existence were often challenged in Courts causing huge financial burden on the State Exchequer. It was enacted primarily and essentially for regulating and controlling the expenditure to be incurred out of the appropriate budgetary provision.

167. Henceforth, all the expenditure as sanctioned by the 2005 Act would be only legally enforceable if there is any breach.

168. Section 14 of the said Act deals with the scale of pay and incidental matters in relation to a teacher.

169. The said Section has three categories:

i) Sub-Section 1 deals with post of under graduate teacher,

ii) Sub-Section 2 deals with post of graduate teacher; and

iii) Sub-Section 3 deals with honours graduate teacher.

170. Sub-section 1 and 2 clearly specifies that it is the post which is the determining factor to decide the scale of pay. If a teacher is appointed in the post as under graduate or pass graduate he would be entitled to draw in the scale of pay in which he is appointed and shall not be entitled to claim any additional increment or higher scale of pay for acquiring any qualification other than qualification specified in such post. However, Sub-section 3 makes a little departure as taking into consideration that the honours graduate candidates have to compete with the post graduate candidates on the same set of syllabus and same set of question papers in the test held by WBSSC for selection of teachers and moreover a single

panel is prepared in a subject from amongst the selected Honours and Master Degree holders. It provides that if a teacher is appointed for the honours or post graduate teacher category he would be entitled to draw pay of post graduate teacher category upon acquiring post graduate degree in the manner as may be specified by order.

171. This appears to be an amalgam of paragraph 12(3) of ROPA 1998 as amended on 13th July, 1999 and Government order dated 3rd June, 2002 as revised on 3rd November, 2004. Initially in terms of Memorandum dated 3rd June, 2002 the higher scale of pay would take effect from the date of joining or the date following the last date of examination (both theoretical and practical) whichever is later but by reason of the subsequent circular dated 3rd November, 2004 different dates have been mentioned. The Act of 2005 was followed by the order issued by the School Education Department on 26th December, 2005 specifying the date from which the Honours or Post graduate teacher can claim higher scale of pay. They are:

> "*a) such teacher has, prior to joining the post, acquired Post-graduate degree in the subject relevant to the appointment shall be entitled to draw pay of Post-graduate teacher category from the date of joining the post: or*
>
> *(b) such teacher has, prior to joining the post, completed the examination for the Post- graduate degree in the subject relevant to the appointment, but the results of such examination has been published after joining the post, shall be entitled to draw pay of Post- graduate teacher category from the date of publication of the results of such examination; or*
>
> *(c) such teacher has, after joining the post improved his qualification with prior permission of the authority competent to grant such permission, shall, on being successful in the results*

> *of the examinations (theoretical and practical) for the Post-graduate degree in the subject relevant to the appointment, be entitled to draw pay of Post-graduate teacher category from the day next following the last day of such examinations."* (emphasis supplied)

172. This government order was issued under Sub-section 3 of Section 14 and in supersession of all order on the subject. If the aforesaid order is read in conjunction with the order dated 3rd June, 2002 it would appear that 3rd June, 2002 has been restored.

173. This continued till 27th November, 2007 when a government **Order** $NO: \frac{593 - SE(B)}{ES/O/B/IM - 98/2007}$ was published specifying the manner in which a teacher appointed in an honours graduate/post graduate scale of pay would be entitled to claim additional increment and higher scale of pay upon acquiring post graduate/or any higher diploma/degree under Section 14(3) of the West Bengal Schools (Control and Expenditure Act, 2005) and other related issues.

174. For the sake of convenience Clause 1 to 9 of the said circular is reproduced below:

> "1. All the teachers teaching in different State Aided Schools will have to take prior permission from the Managing Committee/Ad hoc Committee/Administrator as the case may be to enrol themselves and to appear for any examination for enhancement of educational qualification. The Managing Committee being 'Competent Authority in such cases will take a decision in its next meeting and convey its decision to the teacher concerned immediately. A copy of the decision of the Managing Committee

will be forwarded to the office of the Dl of Schools (SE) of the concerned district.

2. The applicant-teacher thereafter, will, if necessary, apply for Leave/Special Leave/ Study Leave as the case may be (along with the resolution of Managing Committee), to the West Bengal Board of Secondary Education (which is the Competent Authority in this case) through the Managing Committee of the School.

3. The teacher is required to seek prior permission of concerned District Inspector of Schools (SE) (only when he/she wants to claim additional increment/higher scale of pay etc. for obtaining such higher qualification) through the Managing Committee of the School.

4. Provided further that no such permission can be granted on any ground to any teacher who has entered the service/joined the school with Graduate Degree and with a graduate scale of pay. (Any Managing Committee of any school recommending such case in future and/or any District Inspector of Schools granting such prayer will be treated as un 'Offender' under West Bengal Schools (Control of Expenditure) Act, 2005).

5. The courses to be studied should be relevant to the subjects studied in Under Graduate Honours/Post Graduate Course of the Applicant Teacher and none other. The Deemed University/University etc. conducting the examination must be affiliated to UGC.

6. Prayers from teachers who have already secured higher qualification observing the procedure mentioned above and who have submitted his/her claim to concerned District Inspector of Schools with a complete set of papers like certificate, resolution of Managing Committee etc. before the introduction of West Bengal Schools (Control of Expenditure) Act, 2005 may be considered only

by the District Inspectors of Schools (SE) with the approval of Director of School Education, West Bengal only after examining the staffing pattern, vacancy positions etc. of the school concerned.

7. No such prayer for higher scale of pay from any teacher with Graduate Degree and Graduate scale of pay at the time of entry into service/joining the schools will be entertained no matter whether he/she has secured this higher qualification before or after introduction of West Bengal Schools (Control of Expenditure) Act, 2005.

8. Henceforth no permission will be accorded for securing higher qualification for obtaining higher scale of pay to any Assistant Teacher and/or to any Assistant Teacher over 50 years of age serving in any Junior High School or any school respectively,

9. This order will replace all earlier orders published in this matter before the date of coming into effect of West Bengal Schools (Controls of Expenditure) Act, 2005. 1595- SE(S) dated 26.12.2005 also stands modified." (emphasis supplied)

175. Our attention is drawn to amendment made to Section 14 in 2016 and 17th April, 2017 which are not much relevant in deciding the present issue.

176. Significantly the recital in the government order dated 26th December, 2005 and 27th November, 2007 are different. The reference of His Excellency the Governor is significantly absent in the recital of 27th November, 2007.

177. There are two distinct category of cases forming the subject matter of the reference. The first category of cases related to teachers who

were appointed as pass graduate and thereafter acquired higher qualification before the 2005 Act came into force. The Act of 2005 does not have any retrospective effect. The executive order of dated 27th November, 2007 cannot override the statutory rules framed under Article 309 of the Constitution of India having received the assent of the Governor. The Government Order of 27th November, 2007 is subservient to the 2005 Act. It is elementary that the Rule cannot make itself look larger than life and nullify the Act. It owes its existence to the principal act which permits framing of rules for the purposes mentioned in the Act.

178. Under the garb of rule making power the provisions of the Act cannot be amended. The executive order dated 27th November, 2007 in Rule 9 cannot override all the earlier circulars by reason of which the permission may not be required or already granted prior to the said executive order and have been acted upon. It cannot extend the embargo under the Act retrospectively. All the circulars permitting financial benefits by increment or acquiring higher degree are required to be decided on the basis of the Act in the context of the relevant circulars operating in the field prior to the Expenditure Act, 2005 coming into force. Amending rules cannot have any retrospective operation, even if the rule contemplates consideration of an application for a period prior to the said rules coming into force. A statute must be read reasonably and not in a manner which results in absurdity and hardship. The eligibility of a candidate should be on the basis of the rules existing at that time. The statutory authorities and the applicants are expected to follow the law as it stood thence. The authority cannot be

expected to take any action on the pre-supposition that the rule would be amended.

179. In case of any conflict between the government order dated 26th December, 2005 and order dated 27th November, 2007 it is needless to mention that the order dated 26th December, 2005 shall prevail. In fact, the government order of 26th December, 2005 was issued in exercise of power under Section 14(3) of the 2005 Act. Although, it has been argued that for the purpose of making rules the assent of the Governor is not required and inadvertently it has been mentioned that "The Governor is pleased hereby to specify" in the earlier Government order all the applications pending prior to 27th November, 2007 are required to be decided on the basis of the Rules existing during the interregnum period and any benefit accrued cannot be taken away. Moreover, the Secretary School Education Department has admitted that the said **G.O. No.593-SE(B)** dated 27th November, 2007 has not been published in the "Kolkata Gazette Extraordinary" and hence cannot have any statutory force.

180. The right to claim higher scale of pay by any teacher with Honours Graduate Degree at the time of entry prior to 27th November, 2007 would be decided on the basis of the guidelines and circulars existing on the date of his appointment. The service conditions and benefits of such teachers are protected by the earlier Government Orders/Rules which have been issued under the relevant statute and/or rules framed under Article 309 of the Constitution of India.

181. A teacher appointed after the promulgation of the West Bengal School Service Commission Act, 1997 would be entitled to higher scale of pay provided he has acquired such qualification in the relevant subject and the staff pattern permits appointment of a teacher with higher qualification.

182. The requirement of a prior permission before the introduction of the Control of Expenditure Act, 2005 would not be rigidly interpreted particularly when the Managing Committee has granted permission to the teacher concerned for acquiring higher qualifications in the relevant subject without affecting his duties as a teacher of the institution. The District Inspector of Schools shall not deny the benefit of higher scale of pay merely on the ground of failure to obtain prior permission if the DI School is satisfied that it is within the staff pattern and the school shall be benefited by the reason of the teacher acquiring higher qualification. They are also required to be guided by the **Order No.735-SE(S)/SP-32/2002** as revised by the **Circular No.134-SE(S)** dated 3rd November, 2004.

183. A teacher who has entered service in the pass graduate category shall not be entitled to higher scale of pay merely because he has acquired higher qualification subsequent thereto or prior to his appointment. Similarly, a teacher with the post graduate degree, if applied, as a pass graduate candidate and appointed in the pass graduate category shall not be entitled to claim higher scale of pay after his appointment. The reason being that a teacher with the post graduate/honours degree ought to have competed with candidates having post graduate/honours degree and allowing any increment or higher scale of pay to such a teacher who has

entered the service in the pass graduate category in spite of being an Honours graduate or Post graduate would allow back door entry thereby depriving deserving candidates with higher qualifications.

184. A teacher with Honours Graduate degree shall be entitled to post graduate scale of pay upon acquiring a post graduate degree without there being a requirement of any prior permission as the Honours graduate and post graduate degree under Sections 14(3) of the Act of 2005 read with the **Government Order no. 1595-SE(S)** dated 26th December, 2005 are treated alike. The justification is stated in the **Government Order no. 735-SE(S)/SP-132/2022** dated 3rd June, 2002. The **Government Order no. 1595-SE-(s)** dated 26th December, 2005 will have prospective effect. Clause 9 of the **Government Order no. 593-SE(B)** dated 27th November, 2007 shall not be a bar. All teachers who are otherwise covered by the earlier regulations and/or notification and/or orders issued under West Bengal School Service Commission Act, 1997 and scale of pay has been fixed and/or revised shall continue to receive such benefits and shall not be deprived of any financial benefit solely based on the Government Order dated 27th November, 2007 since the said order in any event can only be applied prospectively. Any teacher pursuing higher education prior to the introduction of Control of Expenditure Act, 2005 shall be entitled to ex post facto approval for a higher scale of pay provided the Managing Committee has granted permission and the staff pattern permits a teacher with higher qualification in the relevant subject, on the basis of the Government Order dated 3rd June, 2002 as revised by the Circular dated 3rd March, 2004.

185. In exceptional circumstances the claim of a teacher for a higher scale of pay even where the Managing Committee has not forwarded the application with its resolution may be considered. It is clarified that if the teacher could demonstrate that he has taken all reasonable steps expected of him for obtaining prior permission from the District Inspector and the Managing Committee is responsible for the delay in forwarding the request for permission to the District Inspector shall consider the application on the basis of the circular or Government Order existing on the date of application In absence of any guideline which the District Inspector of School is required to follow in the event it is found that a teacher before joining the institution was already pursuing higher studies or has completed post graduate degree but for some unavoidable reasons permission as contemplated under the Government Order dated 27th November, 2007 could not be obtained, the Government Order dated 27th November, 2007 shall not stand in the way. The District Inspector shall consider such representation on merits. The reason for denying higher scale of pay could be that already there are sufficient number of teachers having Honours/ Post Graduate degree on the said subject in the institution and in such circumstances payment of higher scale of pay would be a burden on the exchequer. The State should have due regard to the fact that a person with higher qualification would be expected to have better knowledge in the subject and the students are likely to be benefited by reason of his acquiring such higher qualification. The date relevant for the purpose of conferring higher financial benefits would be the date of publication of result and not

convocation, that is, the ceremonial conferment of the degree. A teacher is entitled to higher scale of pay once the result is published and the convocation shall relate back to the date of the result. Any other interpretation would be harsh, absurd and arbitrary.

186. If a teacher has been recommended by the School Service Commission for appointment as an assistant teacher under pass graduate category he cannot be sanctioned post graduate scale of pay upon acquiring post graduate qualification subsequent to his date of appointment in view of Government **Order no. 155-SE(B)** dated 13th July, 1999 read with Section 14(b) of the Control and Expenditure Act, 2005 unless his/her claim is covered by the **Order No.735-SE(S)/SP-32/2002** as revised by the Circular No.134-SE(S) dated 3rd November, 2004. The aforesaid Government order has clearly stated that in such case the scale of pay shall be fixed in terms of the educational qualification which is mentioned by the School Service Commission in the recommendation order. In justification we find it apposite to mention that if a teacher is permitted to upgrade his pay scale based on higher qualification obtained after his appointment which is on recommendation of the School Service Commission; it will encourage candidates to resort to unfair means to get themselves enriched by higher scale of pay bypassing the method of selection meant for appointment of teachers under post graduate/honours graduate category at the entry level by non-disclosure or suppression of higher degree. This appears to be the reason for amending 12(3) of ROPA 1999. However, claim for increments

and not higher scale of pay may be considered by the District Inspectors of Schools concerned, it would likely to benefit the students.

187. One of the ways to ascertain the applicability of the Government Order dated 27th November, 2007 in relation to candidates who were pursuing higher studies prior to the said circular would be to find out how the executive authorities interpreted the provision of the Act or the Rules framed thereunder. In fact they have framed the Rules. They are the implementing authority and inextricably connected with the framing and implementing of the Rule.

188. In ***Debala Das v. State of West Bengal*** **(W.P. No.26009(W) of 2014)** the Deputy Director of School Education was considering sanction of a Higher scale of pay in respect of Smt. Debala Das, Assistant Teacher of Gopimohanbarh Girls High School, P.O.- Bhagwanpur, Dist- Purba Medinipur. She joined as an Assistant Teachers in Hons/Post Graduate degree. The decision was:

> *"As Smt. Debala Das has joined as an A.T. in Hons/P.G. Category, she is entitled to draw post graduate scale of pay for having M.Sc. degree in Physics, her relevant teaching subject in light of West Bengal Schools (Control of Exp.) Act 2005 and in terms of G.O.No. 1595-SE(S) dt. 26.12.2005.*
>
> *As the teacher concerned has partially completed her study before entering service she would come under purview of G.O. No. 1595-SE(S) dt. 26.12.2005. Question of taking permission from D.I.S (SE) concerned may not be applicable here."* (emphasis supplied)

189. The said decision was taken on 22nd June, 2016. It thus, clearly shows that for all teachers who were pursuing and/or completed their higher studies prior to the Government Order of 27th November, 2007 would be covered by the Government Order dated 26th December, 2005 and would be entitled to higher scale of pay upon acquiring higher degree which is in consonance with our understanding and interpretation.

190. Consistency and predictability are the hallmark of a sustainable legislation and good governance. The rules have undergone changes with time essentially to address the needs of the time. However, we have not come across rules where financial benefits extended to teachers under various Government orders are being curtailed or withdrawn in corresponding statutes. To illustrate after the 1997 Act has come into force the pay structure and benefits of higher scale of pay for acquiring higher qualification under ROPA 1998 was not immediately changed.

191. The rules made by the Governor in exercise of its power under proviso to article 309 are statutory in nature and irrespective of the fact whether it is prospective or retrospective, are open to challenge on the ground of violation of the Constitution including the Fundamental rights enshrined in part III of the Constitution.

192. In ***Tejshree Ghag & Ors. v. Prakash Parashuram Patil & Ors***. reported in **(2007) 6 SCC 220**, it has been ruled that:

> *"12. .....the State has the power to alter the terms and conditions of service even with retrospective effect by making*

rules framed under [the] proviso appended to Article 309 of the Constitution of India, but it is also well settled that the rule so made ordinarily should state so expressly." (emphasis supplied)

193. In ***Marripati Nagaraja & Ors. v. Government of Andhra Pradesh & Ors.*** reported in **(2007) 11 SCC 522**, the Supreme Court has ruled that:

"16. the State, in exercise of its power conferred upon it under the proviso appended to Article 309 of the Constitution of India, is entitled to make rules with retrospective effect and retroactive operation. Ordinarily, in absence of any rule and that too a rule which was expressly given a retrospective effect, the rules prevailing as on the date of the notification are to be applied. But if some rule has been given a retrospective effect which is within the domain of the State, unless the same is set aside as being unconstitutional, the consequences flowing therefrom shall ensue. In such an event, the applicable rule would not be the rule which was existing but the one which had been validly brought on the statute book from an anterior date." (emphasis supplied)

194. ***Francis Bennion's Statutory Interpretation, 7th Edn.***, provides an insight as to the presumption of retrospective legislation. The learned author has stated thus:

"The essential idea of a legal system is that current law should govern current activities. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. [(***Solar Century Holdings Ltd. v. Secretary of State for Energy***

> ***and Climate Change* (2014) EWHC 3677 (Admin) at 92]** We believe that the nature of law is such that '... those who have arranged their affairs.... in reliance on a decision which has stood for many years should not find that their plans have been retrospectively upset. [(***EWP Ltd v Moore* (1992 QB 460 at 474)]**
>
> The principle is sometimes expressed in the *maxim lex prospicit non respicit* law looks forward not back. [***Jenk Cent 284. See also 2 Co Inst 292].*** As Willes J said in ***Phillips* v Eyre [(1870) LR 6 QB 1 at 23.]** retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. (See also ***Anthlumney, Re, ex p Wilson [1898] 2 QB 547***) (emphasis supplied)

195. The basis of the principle against retrospectivity is 'no more than simple fairness, which ought to be the basis of every legal rule'. (See ***L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd., 1994(1) AC 486***)

196. Having cautioned against undue or mechanistic reliance on generalised presumptions Lord Mustill then went on to address the question of how the courts approach the question of what simple fairness demands:

> *"Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective*

> *effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.*
>
> *He then went on to list factors relevant to reaching his decision, including the value and nature of the rights affected, the purpose of the legislation and the hardship of the result."* (emphasis supplied)

197. Despite the general principle, there is no doubt that Parliament does have power to introduce a retrospective effect. Moreover, this approach is sometimes justifiable, particularly when things have gone wrong. As Fuller explained:

> '*It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces'.*

198. A policy decision taken by the Government is not liable to interference, unless the court is satisfied that the rule making authority has acted arbitrarily or in violation of the fundamental rights guaranteed under

Article 14 and 16. (See ***K Narayana v. State of Karnataka;*** **AIR 1994 SC 55)**.

199. Plethora of decisions on either side has been relied upon of which we have decided to consider few to avoid duplication and multiplication of authorities. The decisions are:

i) ***Bhagwan Dass & Ors v. State of Haryana & Ors.,*** reported in **1987 (4) SCC 634** is a case concerning equal pay for equal work. The issue was whether temporary appointees and employees in regular cadre in the same Government department if are performing similar duties although by different selection process or that the appointment or scheme under which appointments have been made are temporary would be entitled equal pay. Primarily the issue was with regard to the right of a temporary employee to claim equal pay for equal work at par with permanent employees. The said judgment recognised the right of a temporary employee to claim equal pay only after discharging the burden of proving similarly in the nature of work.

ii) The principle of equal pay for equal work depends upon pay structure as observed in ***State of Bihar & Ors. v. Bihar Secondary Teachers Struggle Committee, Munger & Ors.,*** reported in **2019(18) SCC 301**. The relevant consideration and factors are stated thus:

"102. We must also consider observations of this Court in paragraph 12 in its decision in Secretary, Finance Department and Ors. v. West Bengal Registration Service Association and Ors. 1993 Supp (1) SCC 153, which bring out how a 'pay structure' is evolved. The relevant portion of said paragraph was:

"12. .....Ordinarily a pay structure is evolved keeping in mind several factors, e.g., (i) method of recruitment, (ii) level at which recruitment is made, (iii) the hierarchy of service in a given cadre, (iv) minimum educational/technical qualifications required, (v) avenues of promotion, (vi) the nature of duties and responsibilities, (vii) the horizontal and vertical relativities with similar jobs, (viii) public dealings, (ix) satisfaction level, (x) employer's capacity to pay, etc. We have referred to these matters in some detail only to emphasise that several factors have to be kept in view while evolving a pay structure and the horizontal and vertical relativities have to be carefully balanced keeping in mind the hierarchical arrangements, avenues for promotion, etc. Such a carefully evolved pay structure ought not to be ordinarily disturbed as it may upset the balance and cause avoidable ripples in other cadres as well." (emphasis supplied)

103. We, therefore, have to proceed on the following basic premise:

103.1 It was open to the State to have two distinct cadres namely that of 'Government Teachers' and 'Niyojit Teachers' with Government Teachers being a dying or vanishing cadre. The incidents of these two cadres could be different. The idea by itself would not be discriminatory.

103.2. The pay structure given to the Niyojit Teachers was definitely lower than what was given to Government

Teachers but the number of Government Teachers was considerably lower than the number of Niyojit Teachers. As stated above, presently there are just about 66,000 Government Teachers in the State as against nearly 4 lakh Niyojit Teachers. There is scope for further appointment of about 1 lakh teachers which could mean that as against 5 lakh teachers the number of State Teachers would progressively be going down.

103.3. The parity that is claimed is by the larger group with the lesser group as stated above which itself is a dying or a vanishing cadre.

103.4. The mode of recruitment of Niyojit Teachers is completely different from that of the Government Teachers as stated above.

104. If a pay structure is normally to be evolved keeping in mind factors such as "method of recruitment" and "employer's capacity to pay" and if the limitations or qualifications to the applicability of the doctrine of 'equal pay for equal work' admit inter alia the distinction on the ground of process of recruitment, the stand taken on behalf of the State Government is not unreasonable or irrational. Going by the facts indicated above and the statistics presented by the State Government, it was an enormous task of having the spread and reach of education in the remotest corners. Furthermore, the literacy rate of the State which was lagging far behind the national average was also a matter which required attention. The advances made by the State on these fronts are quite evident. All this was possible through rational use of resources. How best to use or utilise the resources and what emphasis be given to which factors are all policy matters and in our considered view the State had not faltered on any count. As laid down by this Court in the decisions in Joginder Singh 1963

Suppl. 2 SCR 169 and Zabar Singh (1972) 2 SCC 275, the State was justified in having two different streams or cadres. The attempt in making over the process of selection to Panchayati Raj Institutions and letting the cadre of State Teachers to be a dying or vanishing cadre were part of the same mechanics of achieving the spread of education. These issues were all part of an integrated policy and if by process of judicial intervention any directions are issued to make available same salaries and emoluments to Niyojit Teachers, it could create tremendous imbalance and cause great strain on budgetary resources.

105. It is true that the budgetary constraints or financial implications can never be a ground if there is violation of Fundamental Rights of a citizen. Similarly, while construing the provisions of the RTE Act and the Rules framed thereunder, that interpretation ought to be accepted which would make the Right available Under Article 21A a reality. As the text of the Article shows the provision is essentially child-centric. There cannot be two views as regards the point that Free and Compulsory Education ought to be quality education. However, such premise cannot lead to the further conclusion that in order to have quality education, Niyojit Teachers ought to be paid emoluments at the same level as are applicable to the State Teachers. The modalities in which expert teachers can be found, whether by giving them better scales and/or by insisting on threshold ability which could be tested through examinations such as TET Examination are for the Executive to consider." (emphasis supplied)

iii) In ***Chaman Lal & Ors. v. State of Haryana,*** **AIR 1987 SC 1621** the appellants were all trained graduates that is to say, all of them possessed the B.Ed or B.T degree in addition to the B.A. degree. They were teachers in government schools in the State of

Haryana. They did not possess the B.Ed and B.T degree when they joined service initially. They acquired the B.Ed and B.T degree subsequent to their joining service which was between the years, 1953 and 1973. Some of them acquired B.Ed and B.T degree before September 5, 1979 and in some cases after 5th September, 1979. In Haryana Educational Service, there were two categories of teachers described as Masters and Basic Trained teachers. 25% of the posts of Masters were reserved for promotion from the post of basic trained teachers. Masters could be promoted to higher posts. There was a pay revision of the pay scales present to an order dated 23rd July, 1957 all teachers according to their qualification were placed in two broad categories.

"Category A :

> Rs. 110-8-190/10-250 with a higher start for MA & M.Sc. as at present. The existence percentage of posts fixed by Government for scales of Rs.110-8-190/10-250 and Rs.250-300 should remain unchanged at 35% and 15% respectively.

Category B :

> Lower Rs.60-4-80/5-120, Middle Rs.120-5-175, Upper Rs.140-10-200.

> With a view to providing incentives, it has been decided that posts falling in these groups should be in the following as G Group I: Lower Scale 85% Middle Scale 15%.
>
> 15% of teachers in this group should straightway be promoted to the middle scale by a selection based on seniority and merits, while the rest should be given the lower scale."

It was noticed that a scale of pay was linked to the qualification. The question arose whether teachers who started as Basic Trained Teachers and later acquired the B.Ed or BT. Qualifications, but who could not be adjusted against posts of Masters would be entitled to the grade of Rs.110-250 which was earmarked for category A. On consideration of the recommendation of the Kothari Commission which, *inter alia*, had strongly expressed the view that the scale of pay should be linked to the educational qualification and incentives to teachers of special subject or to teachers with additional qualifications can be given in the form of advance increment or special allowances expressed the view that the teachers acquiring BT or B.Ed qualification would become entitled to higher scale of pay. The Honourable Supreme Court in deciding the issue has taken into consideration paragraph 3.16 of the Kothari Committee recommendation which states:

> *"Our attention has been drawn to an anomaly which must be removed as early as possible, several States restrict, on financial grounds, the number of posts which carry the scale of trained*

teachers who have completed the secondary school course. The remaining posts are usually assigned to lower scales of pay sanctioned for teachers with lower qualifications. Not infrequently, persons with lower qualifications are recruited to these posts even when qualified and trained teachers are available. This is bad enough; but what is worse, even trained and qualified teachers who are recruited against the posts are given, not the salaries of qualified and trained teachers to which they are entitled but the lower salaries meant for these posts. As the completion of secondary school course and two years of professional training are accepted as the minimum qualification for a primary teacher, this practice should be abandoned as early as possible and the principle adopted that every trained teacher who has completed the secondary school course received the scale of pay sanctioned for such teachers. This will remove an injustice now being done to a large number of teachers in service, and create an incentive for unqualified or untrained teachers to become qualified and trained." (emphasis supplied)

iv) In ***Pubjab Higher Qualified Teachers Union & Ors. v. State of Pubjab & Ors.,*** reported in **AIR 1988 SC 892** the issue was whether the matriculate junior basic trained teachers falling under category B group II would be entitled to higher scale of pay upon acquisition of higher educational qualification of B.A., B.T/B.A, B.Ed etc. The circular dated 23rd July, 1957 was taken into consideration. Paragraph 3 of the said circular was in relation to revision of pay scales of teachers under two distinct categories. Category A and category B *inter alia,* laid down the requirements of academic qualifications with respect to each. On interpretation

of paragraph 3 it was observed that the revision of pay of teachers was based on the principle of linking pay to qualification. The Kothari Commission strongly expressed the view that the scales of pay of teachers should be linked to educational qualifications. On consideration of the relevant clauses it was held:

> *"12. As a matter of plain construction, we are quite clear in our mind that Graduate Teachers form a class by themselves and cannot be subjected to the further requirement of having JST/JAV training. The words 'plus JAV training' clearly qualify the word 'Matric' and relate only to Matriculate JBT Teachers. Such a classification for revision of pay satisfies the touchstone of Art. 14 and would render the action of the State Government in seeking to discriminate between Graduate Teachers with JST/JAV training and Graduate Teachers with or without such training, impermissible as the attempt is to create a class within a class without any rational basis."*

The contention of the petitioner that they are entitled to higher pay on acquiring or improving their academic qualifications has been upheld.

v) In ***State of Gujarat & Anr. v. Ramanlal Keshav Lal Soni & Ors.,*** reported in **1983 (2) SCC 33** a Constitution Bench of the Hon'ble Supreme Court was considering retrospective operation of a statute in relation to the legal rights of the persons likely to be affected by reason of an amendment giving retrospective operation. The Constitution Bench of the Court considered the

question whether the status of ex-ministerial employees who had been allocated to the Panchayat service as Secretaries, Officers and Servants of Gram and Nagar Panchayats under the Gujarat Panchayat Act, 1961 as government servants could be extinguished by making retrospective amendment of the said Act in 1978.

The aforesaid matter involves the status of employees of various municipalities whose services were to a Single Centralized Panchayat Service as distinct from the "State Service". The Panchayat service consisted of district cadre, Taluqa cadre and local cadre (vide Order dated 2nd January, 1967 made under Section 203 of the Act). The Taluqa and District Development Officers were officers of the State Government. The Gujarat Panchayat Service (Absorption, Seniority, Pay and Allowances) Rules, 1965 were not made effectively applicable unless equivalence of posts was first determined by Government Order. Although benefits relating to equation of posts, promotions, fixation of pay scales and revision thereof (which were made on the basis of the recommendations of Pay Commissions) were extended to the District and Taluqa cadres, the State Government did not make any order in that regard for the staff in the local cadre. The ex-Municipal employees included in the local cadre thereupon also filed a writ petition before the Hon'ble Supreme Court challenging the constitutional validity of the Amending Act.

The facts and the issues have been briefly summarized in paragraph 50 and 51 of the said judgment which reads:

"50. It is here necessary to recapitulate a few facts. When the Panchayat Service was initially constituted soon after the passing of the gujarat Panchayats Act, there were three cadres, the district cadre, the taluqa cadre and the local cadre. Secretaries, officers and servants of the old village panchayats under the Bombay Village Panchayats Act, 1958 became Secretaries, Officers and servants of the new Gram Panchayats under Section 325 (2)(x) of the Gujarat Panchayats Act, 1961. Talatis and Kotwals, who were Government servants were Secretaries and officers of the old village panchayats under the Bombay Village Panchayats Act and so they became secretaries and officers of the new gram panchayats under the Gujarat Panchayats Act, 1963. Some municipalities constituted for municipal districts and municipal boroughs under the Bombay District Municipal Act and the Bombay Municipal Boroughs Act as applied to areas in the State of Gujarat, were converted into gram and nagar panchayats under Section 307 of the Gujarat Panchayats Act and all officers and servants in the employ of such municipalities became officers and servants of interim panchayats and allocated to the Panchayat Service. Thus, Secretaries and Officers of dissolved municipalities also became Secretaries and officers of gram and nagar panchayats. District Local Boards constituted under the Bombay Local Boards Act stood dissolved on the passing of the Gujarat Panchayats Act and all officers and servants in the employment of the Board were deemed to be transferred to the service of the successor district panchayat under Section 326 of the Gujarat Panchayats Act. Also allocated to

the Panchayat Service were those Government servants who were transferred to the Panchayats under Section 157 and such others officers and servants employed in the State Service as were necessary (Section 206(iii)). All these Secretaries, officers and servants became members of a service under the State as soon as they were allocated the Panchayat Service. Now, by the Amending Act, secretaries, officers and servants of Gram and Nagar Panchayats who were allocated to the Panchayat service from the ranks of the ex-municipal employees are sought to be meted out differential treatment from the other members of the Panchayat Service, more particularly the Secretaries, officers and servants of Gram and Nagar Panchayats who were drawn from the ranks of secretaries, officers and servants of old village panchayats, that is the Talatis and Kotwals. Their status as members of a service under the State is to go with no option to them. Retrospectivity is sought to be given to the amending act so that they could not claim that they were ever Government servants and so could not be made to cease to be Government servants and so that they could not claim that they were singled out for differential treatment, for, if they were never in the Panchayat Service, they could not complain of being taken out of the Panchayat Service.

51. Now, in 1978 before the Amending Act was passed, thanks to the provisions of the Principal Act of 1961, the ex-municipal employees who had been allocated to the Panchayat Service as Secretaries, Officers and servants of Gram and Nagar Panchayats, had achieved the status of government servants. Their status as Government servants could not be extinguished, so long as the posts were not abolished and their services were not terminated in accordance with the provisions of Article 311 of the

Constitution. Nor was it permissible to single them out for differential treatment. That would offend Article 14 of the Constitution. An attempt was made to justify the purported differentiation on the basis of history and ancestry, as it were. It was said that Talatis and Kotwals who became Secretaries, officers and servants, of Gram and Nagar Panchayats were Government servants, even to start with, while municipal employees who became such secretaries, officers and servants of Gram and Nagar Panchayats were not. Each carried the mark or the 'brand' of his origin and a classification on the basis of the source from which they came into the service, it was claimed, was permissible. We are clear that it is not. Once they had joined the common stream of service to perform the same duties, it is clearly not permissible to make any classification on the basis of their origin. Such a classification would be unreasonable and entirely irrelevant to the object sought to be achieved. It is to navigate around these two obstacles of Article 311 and Article 14 that the Amending Act is sought to be made retrospective, to bring about an artificial situation as if the erstwhile municipal employees never became members of a service under the State. Can a law be made to be destroy today's accrued constitutional rights by artificially reverting to a situation which existed seventeen years ago? No." (emphasis supplied)

Striking down the said amendment on the ground that it offended Articles 311 and 14 of the Constitution, the Court said:

"52. The legislation is pure and simple, self-deceptive, if we may use such an expression with reference to a legislature-made law. The legislature is undoubtedly competent to

legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do's and don'ts of the Constitution neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today.

The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history. It was pointed out by a Constitution Bench of this Court in ***B.S. Yadav and Ors. etc. v. State of Haryana and Ors. etc****. (1981)ILLJ 280 SC Chandrachud CJ., speaking for the Court held:*

> *"Since the Governor exercises the legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate, must be shown to bear either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case".*

Today's equals cannot be made unequal by saying that they were unequal twenty years ago and we will restore that

position by making a law today and making it retrospective. Constitutional rights, constitutional obligations and constitutional consequences cannot be tempered with that way. A law which if made today would be plainly invalid as offending constitutional provisions in the context of the existing situation cannot become valid by being made retrospective. Past v*irtue (constitutional) cannot be made to wipe out present vice (constitutional) by making retrospective laws. We are, therefore, firmly of the view that the Gujarat Panchayats (Third Amendment) Act, 1978 is unconstitutional, as it offends Articles 311 and 14 and is arbitrary and unreasonable. We have considered the question whether any provision of the Gujarat Panchayats (Third Amendment) Act, 1978 might be salvaged. We are afraid that the provisions are so intertwined with one another that it is well-nigh impossible to consider any life saving surgery. The whole of the Third Amendment Act must go. In the result the Writ Petition Nos. 4266-70 are allowed with costs quantified at Rs. 15,000. The directions given by the High Court, which we have confirmed, should be complied with before June 30, 1983. In the meanwhile, the employees of the Panchayats covered by the appeal and the Writ Petitions will receive a sum of Rs. 200 per month over and above the emoluments they were receiving before February 1, 1978. This order will be effective from February 1, 1983 The interim order made on February 20, 1978 will be effective upto January 31, 1983. The amounts paid are to be adjusted later."*

It has been categorically stated that the amendment cannot go against the object of the principal Act.

The said decision in ***Raman Lal Keshav Lal Soni*** **(1983) 2 SCR 287** of the Constitution Bench of the Supreme Court

has been followed by various Division Benches of the Apex Court. (**K.C. Arora v. State of Haryana (1984) 3 SCR 623**; ***T.R. Kapur v. State of Haryana*** (**1987) 1 SCR 584**]; **P.D. Aggarwal v. State of U.P. (1987) 3 SCR 427]**; ***K. Narayanan v. State of Karnataka 1994 Supp (1) SCC 44]; Union of India v. Tushar Ranjan Mohanty (1994) 5 SCC 450] and K. Ravindranath Pai v. State of Karnataka 1995 Supp (2) SCC 246).***

vi) A Constitution Bench in ***Chairman, Railway Board and Ors. v. C.R. Rangadhamaiah and Ors***. **AIR 1997 SC 3828: 1997 (6) SCC 582,** dealt with the case where the pension admissible under the Rules in force at the time of retirement was introduced with retrospective effect. The Court held such an action to be unreasonable and arbitrary being violative of Articles 14 and 16 of the Constitution of India. The Court observed as under:

> "20. It can, therefore, be said that a rule which operates in future so as to govern future rights of those already in service cannot be assailed on the ground of retroactivity as being violative of Articles 14 and 16 of the Constitution, but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed of, e.g., promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively....
>
> 24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in

the matter of promotion, seniority, substantive appointment, etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution." (emphasis supplied)

It is now well settled that accrued rights cannot be taken away by repealing the statutory provisions arbitrarily. More so, the repealing law must provide for taking away such rights, expressly or by necessary implication.

The said decision was in turn followed in ***The Vice Chairman, Delhi Development Authority v. Narender Kumar & Ors.,*** reported in **2022 (1) SCC 641** in paragraph 35, which reads:

"35. Several previous judgments of this Court dealing with the question that what is accrued or vested right were considered in ***Chairman, Railway Board v. C.R. Rangadhamaiah 1997 Supp (3) SCR 63*** *wherein the impugned Rule in question sought to disturb the method of calculating the last pay drawn for the purposes of pension and related allowances. This impacted the pension disbursement of a large number of employees who had retired much earlier. The court observed that the amendments applied to employees who had already retired and were no*

longer in service on the date the impugned notifications were issued, and adversely impacted the pension they were drawing. In such context the court held as impermissible, those benefits which accrued or in other words had been actually enjoyed and were taken away by the devise of giving retrospective effect to the rule.

vii) In ***M.P. Rural Agriculture Extension Officers Association v. State of M.P. & Anr.***, reported in **2004 (4) SCC 646** the Hon'ble Supreme Court observed that two different pay scales can be provided in the same cadre on the basis of educational qualification even if nature of work is the same and the post are interchangeable. It reiterated that the recommendation of the pay commission is not binding on the State and cannot be enforced by issuing a writ in the nature of mandamus. State can make rules in exercise of power under proviso to Article 309 contrary to the recommendation by evolving policy decision and give the same retrospective effect. It has categorically stated that a valid classification can be made on the basis of educational qualification.

In the instant case a policy decision has been taken to extend financial benefits upon acquiring higher qualification subject to fulfilment of certain criteria which *inter alia,* includes prior permission and staff pattern of the school. The said policy decision

is based on past experience and the financial capacity and ability to meet expenses encompassed in the Act of 2005.

There is a rational basis for the said decision. It is trite law that Article 14 does not forbid a reasonable classification. Article 14 forbids class legislation but permits reasonable classification subject to the conditions that it is based on an intelligible differentia and that the differentia must have a rational nexus to the object sought to be achieved. Constitutional interpretation is a difficult task. Its concept varies from statute to statute, fact to fact, situation to situation and subject matter to subject matter. [See ***M.P. Rural Agriculture Extension Officers Association*** *(supra)**]***

viii) In ***Council of Scientific and Industrial Research & Ors. v. K.G.S. Bhatt*** reported in **AIR 1989 SC 1972** it was held that when any bye law restricts promotion of employee, then it shall be liable to be set aside. The issue before the Hon'ble Supreme Court was whether the respondent was entitled for promotional benefit. The bye-law governed only promotion of junior scientific and technical staff grade-II who are engaged in scientific work. One who was engaged in scientific work was alone entitled to benefit of the bye-law. The respondent no.1 had suffered and stagnated for about twenty years in same scale from inception due to defective promotional policy. It was on such consideration the Hon'ble Supreme Court did not interfere with the relief granted by the

Tribunal and agreed with the views expressed on scope of bye-law 71(b)(ii) which exclude any person under the "administrative category".

ix) In ***O.Z. Hussain v. Union of India & Ors.,*** reported in **AIR 1990 SC 311** the issue was with regard to the parity in payment and availability of promotional avenues. The writ petitioners alleged discriminatory treatment meted out to Scientists of non-medical wing of Ministry of Health and Family Welfare. From the evidence, it transpired that promotional avenues were available to similar officers in other Ministries. On such consideration the Hon'ble Supreme Court disposed of the application filed under Article 32 of the Constitution of India with a direction upon the respondent authorities to frame Rules providing for promotional avenues.

x) ***J.S. Yadav vs. State of Uttar Pradesh and Anr.*** reported in **2011 (6) SCC 570** has laid down two principles namely i) vested right can be taken away only if the law specifically or by necessary implication provides for such a course and ii) the legislature has the competence to unilaterally alter conditions of service with retrospective effect. Although legislature is so competent but intention of the legislation to apply amended provision with retrospective effect must be evident from the amendment Act itself expressly or by necessary implication. Moreover the aforesaid power of legislator is qualified to the effect that such unilateral alteration should be in conformity with legal and constitutional

provisions. Any right accrued under the Act/ordinance which stood repealed would continue to exist unless they have specifically or by necessary implication been taken away by the repealing Act. The judgment recognised that the amendment with retrospective operation can be declared ultra vires when it takes away the vested right of the petitioners. In paragraph 25 of the said decision the Hon'ble Supreme Court referred to its earlier judgment in ***P.D. Aggarwal v. State of UP*** reported in **1987(3) SCC 622** para 18 in which it was held as under:

> *"18. ...the Government has power to make retrospective amendments to the Rules but if the Rules purport to take away the vested rights and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16 of the Constitution.*"

We may also refer to paragraph 27 and 29 of the said judgment where the limitation to retrospective operation of a statute was considered and discussed:

> *"27. This Court in State of Punjab v. Bhajan Kaur (2008) 12 SCC 112, while dealing with the provision of Section 6 of the 1897 Act, held as under:*
>
> *'9. A statute is presumed to be prospective unless held to be retrospective, either expressly or by necessary implication. A substantive law is presumed to be prospective. It is one of the facets of the rule of law*

10. ....Where a right is created by an enactment, in the absence of a clear provision in the statute, it is not to be applied retrospectively".

xi) In ***Dist. Inspector of Schools Kolkata vs. Abhijit Baidya*** reported in **2013 (3) CHN (Cal) 711** the Full Bench of this Court was considering the amendment of para 17 of ROPA 1990. The question was whether employees have to be given an opportunity to switch over from CPF-cum-Gratuity to Pension-cum-Gratuity Scheme in view of the amendment and the retrospective effect of the amendment was under consideration. It was noticed that the paragraph 13 of ROPA 1998 is similar to paragraph 17(2) of ROPA 1990. The ratio of the decision is that the amendment of substitution with retrospective effect cannot take away the right accrued under existing para 17(2) of ROPA 1990. Any change of government policy must be in conformity with reasonableness and principle of natural justice is required to be followed. The questions answered by the Special Bench are mentioned in paragraph 9:

i) Whether a person who has opted for revised pay scale under ROPA, 1990 becomes entitled to pension by virtue of operation of para 17 of ROPA 1990?

ii) Whether an incumbent who has exercised an option under ROPA 1990 can still be conditioned to the rider of option to be exercised under W. Ben. Recognised Non-

Government Educational Institution Employees DCRB Scheme, 1981, particularly in view of the amendment effected in paragraph 17(2) vide G.O. 226-SE (B)/1M-102/98, dated 16th May, 2007 and whether the amendment made in paragraph 17(2) can be said to be valid law; that too with retrospective effect?

iii) Whether para 13 of Revision of Pay & Allowance Rules 1998, as amended by Notification dated 13th July, 1999 relating to the employees of W. Ben. Recognized Non-Government Aided Institutions can be said to be valid in law?

iv) Whether after amending the para 13 of ROPA 1998 on 13.07.1999 and para 17 of ROPA 1990 in 2007, it was necessary to give fresh opportunity to employees to revise option under W. Ben. Recognized Non-Government Educational institution Employees (Death-cum-Retirement Benefit) Scheme, 1981?

v) Whether the time-limit fixed under the DCRB Scheme, 1981 to submit option can be extended in suitable cases?

The answer is given in paragraph 74 in the following manner:

"1) An employee who has opted for revised pay scale under ROPA, 1990 becomes entitled to pension and gratuity by virtue of operation of para 17 of ROPA 1990. It was not necessary for him to exercise fresh option as per Memo dated 16th December, 1991, which was applicable to employees who had not opted for ROPA 1990. Benefit of Pension-cum-Gratuity was conferred due to acceptance of reduced age of superannuation of 60 years under para 17(1) of ROPA 1990 and his right for Pension-cum-Gratuity

so accrued could not have been taken away retrospectively by substitution of the provisions of para 17 in 2007 or by substitution of para 13 of ROPA 1998 in 1999.

2) Once option has been exercised under ROPA 1990, a person cannot be subjected to the rider of the option exercised under the DCRB Scheme, 1981 as the invitation of the option under the said Scheme was with respect to the employees who elected to continue in service till the age of 65 years and to have the benefit of the old scheme. For such employees, opportunity was given to submit fresh options as per Memo dated 16th December, 1991.

The amendment made in para 17(2) of ROPA 1990 on May 16, 2007 cannot be said to be valid piece of law as such provisions cannot be substituted with retrospective effect to take away the rights already accrued to an employee. So as to validate provisions of para 17(2) of ROPA 1990, as substituted, it was necessary to invite option for switching over to Pension-cum-Gratuity from CPF-cum-Gratuity when the substitution of para 17(2) of ROPA 1990 was made on 16th May, 2007 with retrospective effect.

3) Para 13 of the ROPA 1998 as amended on 13th July, 1999 cannot be said to be valid in the eye of law as it has the effect of taking away benefit conferred by para 17(2) of ROPA 1990, as the ROPA 1998 was made applicable to the employees who had opted for ROPA 1990 and the benefit conferred could not have been taken away by substitution of provisions contained in para 13 of ROPA 1998. It was clearly arbitrary and an unreasonable exercise of power and to treat it as valid and legal, it was necessary to invite fresh option under the DCRB Scheme, 1981 for switching over to Pension-cum-Gratuity as the provisions had been amended

drastically which could not operate to the prejudice of the employees in whose favour right to claim Pension-cum-Gratuity had accrued. The substituted provisions of para 13 of ROPA 1998 fail to qualify Wednesbury principles of reasonableness. The action was in utter violation of fair play and justice.

4) In our opinion, after substitution of para 13 of ROPA 1998 on 13th July, 1999 and para 17 of ROPA 1990 on 16th May, 2007, in order to save the provisions from the vice of arbitrariness, it was necessary to give an opportunity to the employees to submit fresh option under DCRB Scheme, 1981. As the option exercised earlier in terms of the DCRB Scheme, 1981 was made applicable, it was necessary to give fresh opportunity to exercise an option for switching over to Pension-cum-Gratuity and the State could not have acted to the detriment of the employees opting for ROPA 1990 who chose the rider of reduced age of superannuation i.e. 60 years under para 17(1) of ROPA 1990.

5) In our opinion, as there was drastic change of provisions of para 17(2) of ROPA 1990 made by way of substitution in 2007, and ROPA 1998 also interfered with the rights conferred upon the employees under para 17(2) of ROPA 1990, all the employees who opted for ROPA 1990 ought to be given fresh opportunity to submit the option to switch over to Pension-cum-Gratuity".

xii) In ***Shrimanta Kumar Mondal & Ors. v. The State of West Bengal & Ors.,*** **1998(2) CHN 276 (Cal),** the Special Bench of this Court had approved the view expressed in ***Gopalji Sahu v. State of Bihar,*** **CWJC no.1409 of 1991(R)** in which it was held that laying

down the qualification of a teacher in order to maintain the standard of education in an institution is permissible by way of executive instruction. As to the power of the State to specify a date with effect from which a rule or regulation can be made applicable, the Special Bench in paragraph 75 of the report relied upon the decision of our Court in ***The State of West Bengal vs. Ratan Behari De*** reported in **CalLT 1994(1)SC 8; 1993 LAB IC 2199** in which it was held:

> *"In this context, it may be remembered that the power of the State to specify a date with effect from which the regulations framed, or amended, as the case may be, shall come into force is unquestioned. A date can be specified both prospectively as well as retrospectively. The only question is whether the prescription of the date is unreasonable or discriminatory. Since we have found that the prescription of the date in this case is neither arbitrary nor unreasonable, the complaint of discrimination must fail."* (emphasis supplied)

xiii) In ***Union of India & Ors. v. M.V. Manohar Nair*** reported in **2020 (5) SCC 421** the Hon'ble Supreme Court was considering whether Modified Assured Career Progression Scheme envisaged financial upgradation to next grade pay or to grade pay of next promotional post. In deciding the said issue, role of expert body prescribing pay scale and incentives was also considered. The Apex Court observed that the object behind the MACP Scheme is to provide relief against the stagnation. If the arguments of the Respondents are to be accepted, they would be entitled to be paid in accordance with the grade pay offered to a promotee; but yet

not assume the responsibilities of a promotee which would have an adverse impact on the efficiency of administration.

The change in policy brought about by supersession of ACP Scheme with the MACP Scheme was after consideration of all the disparities and the representations of the employees. The Sixth Central Pay Commission is an expert body which has comprehensively examined all the issues and the representations as also the issue of stagnation and at the same time to promote efficiency in the functioning of the departments, the MACP Scheme has been introduced which has been accepted by the Government. After accepting the recommendation of the Sixth Central Pay Commission, the ACP Scheme was withdrawn and the same was superseded by the MACP Scheme with effect from 1st September, 2008. When the government has accepted the recommendations of the pay commission and also implemented those, any interference by the Court would have serious impact on public exchequer. Also when an expert body like the pay commission had comprehensively examined all issues and representations the court should not interfere with the recommendations of the expert body.

The prescription of Pay Scales and incentives are matters where decision is taken by the Government based upon the recommendation of the expert bodies like Pay Commission and several relevant factors including financial implication and court

cannot substitute its views. The court should approach such matters with restraint and interfere only when the court is satisfied that the decision of the Government is arbitrary. Even in a case where the court takes the view that order/Scheme passed by the Government is not an equitable one, ordinarily only a direction could be given to the State Government or the authority for consideration of the matter and to take a decision. In the present batch of cases where the Respondents have been claiming financial upgradation in the grade pay of promotional hierarchy, no ground have been made out to show that the MACP Scheme granting financial upgradation in the next grade pay is arbitrary and unjust; warranting interference.

xiv) In ***DDA v. Narendra Kumar;*** **2022(11) SCC 641** the Hon'ble Supreme Court was considering Modified Assured Career Progression Scheme (MACP Scheme) introduced in supersession of ACP Scheme with retrospective effect. The issue was whether employees who had completed eligibility for financial upgradation under ACP Scheme can insist that such upgradation ought to be only under ACP Scheme and not MACP Scheme. The Apex Court held that it is well settled that Central Government in exercise of legislative power conferred under Article 309 of the Constitution can frame Rules having force of law with retrospective effect, however, where such retrospective application has the effect of nullifying or refacing intervening events or invalidating benefits

granted to employees the same can be declared unconstitutional. Factually it was found that none of the employees had actually earned second financial upgradation though undoubtedly they had become eligible for consideration. The eligibility ipso facto cannot translate into entitlement having regard to the ACP Scheme, i.e., such eligibility was mere expectation. The benefits under the ACP/MACP scheme were only incentives not embodied in rules, to relieve stagnation and its continued existence cannot be turned as enforceable right.

xv) In ***Food Corporation of India & Ors. v. Bhartiya Khadya Nigam Karmachari Sangh & Anr.*** reported in **2012 (2) SCC 307** the issue was grant of incentive of two increments to in-service employee on acquiring prescribed additional qualification and denial of same to those who had already acquired same qualifications before entering into service. It was argued that the said classification is unreasonable and violates Article 14 and 16 of the Constitution of India. The said issue was answered in paragraph 11 to 17:

"11. It is trite law that Article 14 of the Constitution, which enshrines the principle of equality, is of wide import. It guarantees equality before the law and equal protection of the laws within the territory of India. It implies right to equal treatment in similar circumstances, except in cases where the two persons form 'a separate and distinct class and such classification is a

reasonable one based on intelligible differentia having nexus with the object sought to be achieved'.

(See: State of West Bengal v. Anwar Ali Sarkar: (1952) SCR 284 and John Vallamattom and Anr. v. Union of India: (2003) 6 SCC 611).

12. Before examining the issue at hand on the touchstone of the aforesaid principle envisaged in Article 14 of the Constitution, it would be apposite to refer to the relevant portions of the Circular dated 29th July, 1985. These read as follows:

"The Food Corporation of India, since its inception, has been pursuing the policy of Management Development by providing suitable training facilities both within the Corporation as well as by nominating its employees to short-term professional courses, work-shops, seminars, conferences etc. organized by leading management institutions in India and abroad.

2. These efforts can get an uplift and possibly be supplemented to a great extent by the involvement of its employees in acquiring professional management qualifications on their own. In order, therefore, to fill the basic gaps to acquire knowledge, the matter has been under consideration for introducing suitable incentive scheme for motivating the employees of the Corporation to encourage them to acquire professional qualifications for rapid career advancement and enabling the Corporation to build a reserve of qualified professionals from within to back up key positions and to improve the overall performance and efficiency of the organization. This will further create an atmosphere of 'professionalism' in the working of the Corporation. With this end in view it has been decided with the approval of the Board of Directors to introduce the following incentive scheme with effect from 1st April, 1984.

3. The following courses of study have been approved for grant of the two increments as indicated in subsequent pages:

(a).

(b) High professional qualifications viz. MBA, ACA, AMIE, LLB, BL, ACS etc. All the above courses (Diplomas/Degrees) should be at least of two years duration.

4. The following are the details of the scheme for grant of incentive:

ELIGIBILITY:

All regular employees of the Corporation would be eligible for benefit under the Scheme subject to the following terms and conditions:

(i) The scheme would apply to all regular employees of the Corporation except deputationists/those employed on contract basis/ casual or on tenure basis.

(ii) Employees covered under (i) above should have acquired or may acquire higher professional qualifications from recognised institutions/ Universities during the course of their service in the FCI with prior permission from the competent authority of the Corporation. The acquisition of said qualification should be useful to the Corporation in its operations.

(iii)-(viii)

(ix) In cases where the employees, who join the higher post under direct recruitment and where for such higher post the prescribed minimum qualification is the same as acquired by the employee while in the lower post, the incentive already granted to him/her in the lower post would not be allowed to continue on his/her appointment to the higher post.

INCENTIVE ADMISSIBLE:

Employees fulfilling the eligibility conditions referred to above would only be entitled to the benefits under the scheme. The incentives offered under this Scheme would be in the form of two special increments as 'personal pay', to be merged in pay at the time of promotion to the next higher grade. This incentive would be admissible only on written orders by the competent authority on merit of each case. The incentive in the form of two increments would be granted starting from first day of the following month when the employee concerned has been declared to have passed the listed Courses or the date of enforcement of this scheme whichever is later.

ENTITLEMENT:

In order to overcome the administrative difficulties and financial implications in implementation of the Scheme with retrospective effect covering all the cases of eligible employees who might have acquired such higher management or professional qualifications prescribed in this Scheme once or more than once in the past and might be holding higher post on promotion or direct recruitment within the Corporation, the employees would be entitled to the incentive under this scheme with effect from 1.4.1984 only. Eligible employees would be entitled to draw incentive increments at the rates applicable to their present pay scales. Arrears of incentive increments shall be payable.

In the case of past cases, eligible employees should apply within six months from the date of the Scheme is circulated. In case of employees who may acquire any of the above qualifications hereafter, they may apply as and when they acquire the higher qualifications in the prescribed Proforma enclosed.

13. It is manifest from a bare reading of the above-mentioned portions of Circular that the fundamental objective of the Circular is

to provide an incentive to the in-service employees in order to motivate and encourage them to acquire professional qualifications in various courses, spelt out in the Circular, for their career progression and at the same time enable the FCI to build a reserve of qualified professionals from within the organisation to back up key positions. Evidently, the incentive will not only improve their overall performance and efficiency in the organisation, but also, in the final analysis would strengthen the management with the advent of an atmosphere of professionalism in the FCI.

14. Our attention was also drawn to Circular No. 27 of 2000, dated 11th September, 2000, empowering the competent authorities to grant higher start/advance increments to newly recruited employees at par with the pay drawn in their previous employment before joining the FCI. It is therefore, plain that the provision to grant extra benefit to a new recruit possessing higher qualifications was already in existence. It is also pertinent to note that the said Circular and the benefit which is sought to be given under any of the Circulars, referred to above, is not assailed by the Respondents. Their only grievance is that there is no justification in depriving the persons, who already possess the higher qualifications from the benefit of extra incentives, which are being granted to the in-house employees.

15. We are of the opinion that bearing in mind the aforesaid fact situation and the objective sought to be achieved by issuance of the said Circular, there is substantial merit in the stand of the FCI. The classification adopted by the FCI is between an employee obtaining a higher qualification after joining service and an employee who already possessed such qualification before joining the service. As aforesaid, the main purpose of this classification is to grant an incentive to the employees already in service in the FCI to motivate them to acquire higher qualifications for their own benefit as well as

of their employer viz. the FCI. We are convinced that the classification sought to be made by the FCI between the two sets of employees bears a just and rational nexus to the object sought to be achieved by introducing the said incentive scheme. Judged from this point of view, in our opinion, grant of the incentive in relation to the in-service employees, in no way amounts to discrimination between the in-service employees and the employees recruited with higher qualification, offending either Articles 14 or 16 of the Constitution, particularly when the incentive is in the form of a special increment as 'personal pay' to be merged in pay at the time of promotion to the next higher grade and thus, having no bearing on the inter-se seniority and/or to the future promotion to the next higher grade.

16. The decisions of this Court in B. Manmad Reddy and Ors. v. Chandra Prakash Reddy and Ors. (supra) and Food Corporation of India and Ors. v. Ashis Kumar Ganguly and Ors. (supra), on which reliance was placed by Learned Counsel for Respondents are clearly distinguishable on facts inasmuch as these decisions deal with cases relating to employees being classified into separate categories for the purpose of promotion on the basis of the source from which they were drawn and increments being given only to the Central Government employees on being absorbed into the corporation respectively, which is not the case here. However, it is important to note that in both these cases, it was observed that the doctrine of equal pay for equal work is not an abstract doctrine. Article 14 of the Constitution permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who are left out. Courts should interfere with the administrative decisions pertaining to pay fixation and pay parity only when they find such a decision to be unreasonable, unjust and prejudicial to a section of employees and taken in ignorance of material and relevant factors.

17. At this juncture, it would be profitable to refer to the decision of this Court in H.P. Gupta and Anr. (supra), which is on all fours to the fact situation in the present appeal. In the said case, grant of two advance increments to Telecom Officers who acquired Engineering degree while in service and not to those who possessed such degree at the time of joining the service was held to be constitutionally valid. Dealing with a similar controversy, the Court observed as follows:

> *The object of giving two advance increments to those officials who did not possess degree in Engineering before joining the service, is only to encourage them to get such a degree so that they could improve themselves while in service. When that object is satisfied, the contentions that there should be equality in the matter of payment of salary or other emoluments or that there should be parity in the matter of giving increments, cannot be accepted. It is true that in such a situation, certain anomalies may arise in specific cases when the official who has acquired degree in Engineering subsequent to joining of service may get higher salary though junior to those who possessed the qualification of degree in Engineering even at the time of joining the service. There cannot be perfect equality in any matter on an absolute scientific basis and there may be certain inequities here and there. If the classification is correct and serves a particular purpose, the same is not to be judicially interfered with.*

We deferentially concur with the observations in the afore-extracted passage." (emphasis supplied)

200. The careful reading of the aforesaid paragraph would show that the objective of the circular was to provide an incentive to the in-service employee in order to motivate and encourage them to acquire professional

qualification and to create a reserve of qualified professionals from within the organisation to back up key positions. Viewed from this angle and comparing it with the incentive in the present case it can be vouchsafed that acquisition of higher qualification after being appointed is expected to uplift the standard of education and it would benefit both the schools and the students. A person with a higher degree even if may be ineligible by reason of his entry in the service with a lower degree can contribute to the knowledge bank of the school and expectedly can impart better education. A teacher with a pass-graduate degree although may not expect a higher scale of pay can legitimately expect an incentive on acquiring of higher qualification which can act as a cushion for not being considered for promotion. Education shall be given highest priority and the teachers are expected to receive decent salary and incentive. As often stated a teacher takes a hand, opens a mind and touches a heart. The transfer of his soul to the student's soul seen through the students is the quality of a good teacher. A teacher can only impart a proper and better education once he feels secured with his job and expect incentive for acquiring higher qualification, although he cannot claim higher scale of pay of that of a teacher who joined service with an Honours-graduate degree or Post Graduate Degree. He cannot be treated alike since the process of selection and recruitment are different. However, caught in between stagnation and promotion, incentive can provide solace to the teachers who have acquired higher qualifications after they joined service. Although the claim for incentive cannot be considered to be a Fundamental Right, the obligation

and duties of the state not to provide a decent pay with incentive need not be overstated. It is a policy decision of the State which we feel needs to be reviewed. The State must formulate a policy with regard to career advancement scheme in respect of the teachers facing stagnation and acquiring higher qualification during employment by way of an incentive. The number of increments also needs to be reviewed.

xvi) In ***Shanti Sports Club and Anr. v. Union of India and Ors.*** reported in **2009(15) SCC 705** the Honourable Supreme Court discussed the ambit of Article 14 and held that the concept of equality enshrined in that Article is a positive concept. The Court can command the State to give equal treatment to similarly situated persons, but cannot issue a mandate that the State should commit illegality or pass wrong order because in another case such an illegality has been committed or wrong order has been passed. If any illegality or irregularity has been committed in favour of an individual or a group of individuals, others cannot invoke the jurisdiction of the High Court or of this Court and seek a direction that the same irregularity or illegality be committed in their favour by the State or its agencies/instrumentalities.

xvii) In ***Akhtar Hossain Chowdhury v. State of West Bengal & Ors.,*** reported in **2013 (2) CHN (Cal) 632** the argument of Mr. Moitra that paragraph 3 of the circular dated 27th November, 2007 cannot override the provisions of the West Bengal Schools (Control of Expenditure Act, 2005) was accepted as would be

evident from paragraphs 15 to 18 of the said decision. The said paragraphs read:

> *"15. Mr. Moitra also submits that Para 3 of the aforesaid circular dated 27th November, 2007 cannot override the provisions of the West Bengal Schools (Control of Expenditure) Act, 2005.*
>
> *16. Mr. Moitra invites our attention to Section 14 (3) of the aforesaid Act, 2005 and submits that the appellant/petitioner is entitled to draw pay of post graduate upon acquiring post graduate degree. The said section 14(3) is set out hereunder :*
>
> > *"(3) Every teacher of a school shall, if appointed in the Honours Graduate or Postgraduate teacher category, be entitled to draw pay of Post-graduate teacher category, upon acquiring Post-graduate degree, in the manner as may be specified by order."*
>
> *17. It is true that a circular cannot override the specific provisions of the Act. In the present case, the appellant/petitioner was admittedly appointed in the school as Honours Graduate with B.Ed degree. As a matter of fact, at the time of joining the school qualification of the appellant was Honours Graduate in Mathematics and B.Ed. Subsequently the said appellant acquired post-graduate degree. Therefore, in terms of Section 14(3) of The West Bengal Act, XIV of 2005 appellant herein is entitled to draw pay of postgraduate teacher. Furthermore, Para 3 of the Office order dated 27th November, 2007 has not been specifically violated in the present case since the appellant also sought for prior permission from the concerned District Inspector of Schools*

for undergoing post graduate studies through the managing committee of the school and such permission was never denied by the said District Inspector of Schools.

18. Considering the aforesaid facts, we are of the opinion that the District Inspector of Schools should not have rejected the claim of the appellant/petitioner for higher scale of pay even after acquiring higher qualification i.e. M.Sc in Mathematics." (emphasis supplied)

We are in agreement with the said decision.

xviii) In ***Adeel Uz Zaman v. State of West Bengal & Ors.***, in **MAT No.825 of 2020** decided on 11th February, 2021 a Co-ordinate Bench constituting of one of us (Soumen Sen, J.) in considering the claim of the appellant for higher scale of pay directed consideration of the matter on the ground that appellant was appointed in science and maths group against a sanctioned vacancy and at the relevant point of time he was holding B.SC. (Hons.) degree in Chemistry. It was on the basis of such qualification he was appointed as a Science Teacher in Chemistry of the said college. The authority concerned was aware of the fact that he was pursuing higher studies at the time of his appointment. In fact, he had completed his Part-I examination in M.Sc and was pursuing his higher studies. It was on such factual background we considered the Government Order dated 27th November, 2007 and observed:

"Clause 1 of the said order is applicable when the teacher concerned is yet to enrol himself in the course and to appear in the examination for enhancement of education qualification. The very fact that he had already enrolled himself prior to his appointment and that he had already participated in the said examination and successfully completed M.Sc. part-I, in our considered opinion he is not required to obtain any prior permission to enrol himself for the purpose of appearing in the future examination for enhancement of his educational qualification as contemplated in clause 3 of the Government Order dated 27th November, 2007. In such view of the matter the decision cited by the Government Pleader passed by a learned Single Judge in ***Purna Chandra Misra*** *(supra) has no manner of application.*

Learned Government Pleader has also relied on two decisions of the Hon'ble Apex Court in the cases of ***U.P. Avas Evam Vikas Parishad & Anr.-vs.-Friends Coop. Housing Society Ltd. & Anr.*** *reported in* ***(1995) Supl. (3) SCC 456****, paragraph 6 and* ***High Court of Judicature for Rajasthan-vs.-P.P. Singh & Anr.*** *reported in* ***(2003) 4 SCC 239****, paragraph 40, in support of his argument that any claim for higher benefits cannot be allowed unless the prior permission is taken. In* ***U.P. Avas Evam Vikas Parishad & Anr.*** *(supra), at paragraph 5 another judgment of the Apex Court in* ***Life Insurance Corporation of India-vs.-Escorts Ltd. and Ors.****: (1986) 1 SCC 264 was referred in which the distinction between approval and permission was considered, in the context of Section 29 (1) of the Life Insurance Corporation of India Act. It was observed that the difference between approval and permission is that in the first case the action holds good until it is disapproved, while in the other case it does not does not become effective until permission is obtained. But permission subsequently granted may validate the previous*

act. In our respectful reading of the said two decisions it does not appear to us that there is any embargo under the statute or the relevant rule to grant any ex post facto permission if there is sufficient reasons otherwise to grant permission.

There cannot be any doubt that a person with higher qualification would be expected to have better knowledge in the subject and the students are likely to be benefited by reason of acquiring such higher qualification. The benefit of higher qualification is no doubt benefit the teacher in terms of money but the students are the beneficiary of such acquired knowledge. The institution is as such benefited. It would be the endeavour of all schools to have academic excellence and it is the duty of the State to encourage academic excellence in all the institutions since the ultimate beneficiary would be the students. We feel that some guidelines should be in place to decide a case like the present one as absence of any such guidelines may lead to arbitrary rejection of a deserving candidate.

We are not unmindful of the fact that the West Bengal Schools (Control and Expenditure) Act, 2005 was enacted to provide for the control of expenditure in the schools in West Bengal and unless the authorities are of the opinion that such expenditure towards payment of the higher salary of a teacher would be a futile exercise or would not be beneficial to the schools or the students, the authorities may decline payment of higher scale of pay. Higher scale of pay would encourage the teacher and would be a motivating factor which ought not to be ignored. The consideration for denying higher scale of pay could be that, already there are sufficient numbers of teachers having Honours/post-graduate degree on the same subject in the institution and, as such, payment of higher scale of pay would be a burden on exchequer. In other words staff pattern may not

justify any higher qualified teacher in a particular subject. In the present case appellant is in receipt of honours graduate scale of pay, staff pattern cannot be a bar for extending the benefit of post graduate scale of pay. We also observe that the relevant Rule does not prevent the authorities from giving an ex-post-facto approval if occasion so arises." (emphasis supplied)

We are in agreement with the view expressed.

In fact in ***Debola Das*** *(supra)* the authorities allowed Debola to higher scale of pay as she had partially completed her study before entering service and hence no prior permission from DI would be required.

xix) In ***The State of West Bengal v. Megnath Roy*****,** in **MAT 514 of 2019** decided on **16th December, 2019,** the same bench that had decided **Adeel Uz Zaman** (*supra*) considered the School Education Department Clause 3 of the Notification dated 27th November, 2007 and interpreted the relevant rules in favour of the writ petitioner and allowed the writ petition on the following reasoning:

"It appears from record that the writ petitioner made representation to the Ad Hoc Committee of the previous school on 23rd April, 2010 to allow him to pursue the course of master degree in Geography through distant mode of education. Thereafter, he joined the present school and similar application was made to the Managing Committee of the present school. The Managing Committee of the present school vide resolution dated 23rd June, 2013 allowed the petitioner to pursue higher studies without affecting the day to day academic necessity of the students. The petitioner completed the distance education course successfully and

obtained master degree in Geography. When he approached the District Inspector of Schools (SE) for higher scale of pay, the same was denied on the ground that he had not obtained the said degree after obtaining prior permission from the District Inspector of Schools vide issuing memo dated 23rd April, 2018.

There cannot be any doubt that at the time when he joined the present school he was already pursuing his higher studies but the only mistake possibly he had done not to seek the permission in terms of Clause 3 of the Government Circular dated 27th November, 2007.

Mr. Jana, learned Counsel for the respondent had drawn our attention to a communication dated 8th June, 2017 from the Deputy Director of School Education to the District Inspector of Schools (SE) directing such authorities to refer the case to the Directorate and not to the School Education Department for disposal of cases of higher scale of pay of teachers of secondary schools as per existing rules in case such authorities facing difficulty. Under Section 14(3) of the West Bengal Schools (Control of Expenditure) Act, 2005, Honours-graduate teacher is entitled to draw pay scale of post-graduate teacher upon acquiring postgraduate degree in the manner as may be specified by the order.

On 27th November, 2007, the School Education Department, Secondary Branch issued ***Order No. 593- SE(B)/ES/O/B/ 1M-98/2007****, wherein clause 3 it is stated that the teacher is required to seek prior permission of concerned District Inspector of Schools only when he wants to draw additional increment/higher scale of pay for obtaining such higher qualification through the Managing Committee of the School. There is nothing on record to show that the Managing*

Committee has forwarded the request of the writ petitioner to the District Inspector of Schools for higher scale of pay for obtaining higher qualification. Undoubtedly, the writ petitioner, at the time of joining the present school was already pursuing the higher studies and the Managing Committee of the present school had permitted him to pursue such course without affecting academic interest of the institution. Section 14(3), as it stands, does not require any prior permission to be taken for obtaining higher qualification. However, manner in which a teacher must be entitled to higher scale of pay upon acquiring post-graduate degree is indicated in the Government Order dated 27th November, 2007."

xx) In ***Trilochan Jana v. State of West Bengal & Ors.,*** reported at **2008 (2) WBLR (Cal) 913** the learned Single Judge considered Clause 16(5) of ROPA 1990, Clause 12(5) of ROPA 1998 and Sub-section 3 of Section 14 of 2005 Act and held that even if it is possible to urge that a subsequent enactment may do away with certain benefits that had been conferred by earlier regulations on an employee but the provision by which it is sought to be taken away is subject to strict construction and any benefit of doubt has to be given to the person whose benefit is sought to be taken away.

Sub-section 3 of Section 14 and Section 20 of Act 2005 was interpreted in the following manner:

"10. SUB-SECTION 3 is worded differently and the effect of it is quite distinct from subsections 1 and 2 of

Section 14. Sub-section 3 equates honours graduate and postgraduate teachers and says that teachers of either category would be entitled to draw the pay of post graduate teachers upon acquiring post graduate degree. Sub-section 3 of Section 14 does not reflect on the rights conferred under clause 16 (5) of ROPA, 1990 as preserved or modified by clause 12 (5) of ROPA, 1998. Section 16 and Section 20 are the savings and overriding provisions of the Act of 2005: Section 16 preserves the previous rights in the limited manner as specified therein. Section 20 is the omnibus overriding provision: "20. The provisions of this Act or any rules or orders made thereunder shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force or in any contract, custom or usages to the contrary,"

(11). SECTION 20 will apply in a case where there is any express provision in the Act of 2005 which is in conflict with any provision or any contract or custom or usage contrary to such provision existing at the time of coming into effect of the said Act of 2005. Since Section 14 (3) of the said Act of 2005 does not detract from clause 16 (5) of ROPA, 1998 as preserved in a slightly modified form by clause 12 (5) of ROPA, 1998. Section 20 has no manner of application in the matter of curtailing any right that the writ petitioner had under the relevant clause of the earlier regulations." (emphasis supplied)

xxi) In ***Chaitali Banerjee v. The State of West Bengal & Ors.,*** reported in **2019 (2) CHN (Cal) 568** Justice Talukdar has considered the Memo dated 27th November, 2007

and interpreted the word “and” in the said Memo as conjunctive in the facts of the said case.

In ***Chaitali Chatterjee*** *(supra)* a provisional certificate was granted in favour of the writ petitioner with an enrolment number and on basis of such enrolment number the writ petitioner completed her M.SC Part-II Course on 7th February, 2010. Having regard to the admitted fact that she completed the post graduate course on the basis of such certificate the claim of enhancement of qualification in terms of Clause 1 of Memorandum Dated 27th November, 2007 was treated as single enrolment in the composite M.SC Course prior to taking up duties in the school.

xxii) In ***Pannalal Mahata v. State of West Bengal & Ors.,*** in **W.P. No.22280(W) of 2012** decided on 30th July, 2015 on noticing that the District Inspector School Purulia granted post facto permission in favour of one Shri Gorai to enhance his qualification and was allowed post graduate scale of pay with effect from 25th July, 2013 that is, the date following the last date of examination Pannalal being similarly placed should be given the same benefits more so when the staff pattern permits another teacher by reason of the retirement of one of the teachers in the mean time.

However, we must clearly state that no appointment can be made disregarding staff pattern even if a teacher acquires higher

qualification. If such higher qualification is acquired with the prior permission then it must be presumed that the authority concerned consciously and with having the knowledge of all essential facts granted permission for acquiring higher qualification involving financial benefits.

201. It is well settled that rules can supplement the statute and cannot supplant it. There is presumption against the retrospective operation of the statute. The 2005 Act read with the Government Memorandum dated 26th December, 2005 makes it clear that to effectuate the purpose of the 2005 Act different categories of teachers on fulfilment of certain conditions would be entitled to get financial benefits. Admittedly the Government Memorandum of 26th December, 2005 was issued in the name of the Governor unlike the Government order dated 27th November, 2007. It is authenticated under Clause (3) of Article 166 of the Constitution of India. When the Parent Statute does not contemplate retroactive operation all financial benefits payable to the teaching and non-teaching staff under different ROPA till the government order was issued dated 27th November, 2007 cannot be denied, curtailed or taken away. The court should not lean in favour of an interpretation which would deny a benefit to the employees by reason of a subsequent statute unless the later statute expressly bars any such benefits retrospectively. The reason being that any such interpretation would result in arbitrariness. It would be harsh and irrational to give to the Government order dated 27th November, 2007 a retrospective effect. The doctrine of fairness also is to be considered as a

relevant factor for construing the retrospective operation of the statute. [See ***Government of India & Ors. v. Indian Tobacco Association;*** **2005(7) SCC 396***]* Valuable rights have accrued in favour of the teaching and non teaching staff under several ROPAs till the Expenditure Act of 2005 was introduced and given effect to the financial benefits. Moreover, the 2005 Act is not intended to deny financial benefits to a Honours graduate degree holder to obtain post graduate degree. A teacher, who has pursued and completed post graduate degree prior to 27th November, 2007 cannot be denied post graduate scale of pay if he has joined course prior to the coming into force in 2005 and has completed the course by the time the Government order dated 27th November, 2007 has come into force or become effective. We also do not find the rationality for selecting the date of convocation for the purpose of extending financial benefits for the simple reason that the relevant and important date is the date of publication of the result and on the basis of the result so published and declared a teacher would be entitled to post graduate scale of pay.

202. Similarly, the scale of pay to which a teacher joined cannot be altered to his/her disadvantage.

203. The staff pattern introduced vide Government order dated 8th July, 1974 and 4th September, 1998 is for the purpose of equitable distribution of the available posts as to enable pass degree holder to also complete for appointment as Assistant teacher. The issue of staff pattern *vis a vis* higher scale of pay was explained by Justice Dipankar Datta as His Lordship then was before His Lordship's elevation as the Chief Justice of

Bombay High Court and thereafter to the Hon'ble Supreme Court of India in ***Shivaji Chakraborty vs. State of West Bengal and Ors.*** (WP 9657(w) of 2009) decided on 23rd June, 2010 in the following words:

> *"Once a teacher with pass-degree is appointed, the object for which such Government Orders were introduced is sub-served. The said Government Orders do not lay down any restriction on a teacher from enhancing his educational qualification. It has to be remembered that enhancing of educational qualification by a teacher serves two-fold purpose: (i) the likelihood of hike in pay in the absence of available channel of promotion a teacher encourages to enhance his qualification and thereby the prospect of stagnation in service is averted and (ii) to some extent at least the students to whom lessons are imparted are benefited by the knowledge the teacher has derived after successfully obtaining the Master's Degree. At the time the petitioner was appointed or when he enhanced his qualification after permission was accorded, there was no statutory provision in the field that could stand in the way of he being granted the higher scale of pay for acquiring higher qualification. The petitioner was granted permission by the Additional District Inspector and based on such permission, he obtained necessary study leave in accordance with the Leave Rules and his leave has also been sanctioned by the Board. The ultimate success that the petitioner achieved by obtaining Master's Degree would be set at naught if the State respondents are now allowed to deny his claim based on a law which was not in existence on the date right accrued in his favour to have higher scale of pay offered to him. It is settled law that a vested right cannot be taken away by an enactment, unless of course, such enactment has retrospective operation. As already been noted, the Act has not been given retrospective operation provisions of Section 16 of the Act may also be taken note of in this connection which reads as follows:*

> *"16. Notwithstanding anything contained elsewhere in this Act, the terms and conditions of service of a teacher or a non-teaching staff in the employment of a school immediately before the commencement of this Act, shall not be varied to his disadvantage in so far as such terms and conditions relate to the appointment of such teachers and nonteaching staff to the post held by them immediately before the commencement of this Act".*
>
> *Therefore, the act cannot stand in the way of the petitioner being offered the higher scale of pay.* (emphasis supplied)

Undoubtedly persons similarly placed as Shivaji Chakraborty would be entitled to higher scale of pay on enhancement of their qualification and we are in agreement with the view expressed in this regard.

204. We agree with the submission of the learned Advocate General that career advancement scheme does not create any vested right or a legal right to claim higher scale of pay. It was introduced to take care of stagnation qua promotion. The teacher is not precluded from acquiring higher degree and compete for the higher post during the recruitment process. The process of selection and recruitment are different. Acquiring of higher qualification is not a fundamental right but a person acquiring a higher qualification is entitled to participate in the examination for higher post or for promotion if such qualification is commensurate with the post for which he applied. A person with Pass Graduate Degree cannot be treated at par with an Honours Graduate or a Post Graduate. The qualifications at the entry level are the determining factor.

205. The word 'vested' came up for consideration in ***M.G.B. Gramin Bank vs. Chakrawarti Singh;*** **2014(13) SCC 583** in connection with a scheme for compassionate appointment. The court observed as under:

> *"11. The word 'vested' is defined in Black's Law Dictionary (6th Edition) at page 1563, as:*
>
> *'Vested',-fixed; accrued; settled; absolute; complete. Having the character or given in the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. Rights are 'vested' when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute 'vested rights'.*
>
> *12. In Webster's Comprehensive Dictionary (International Edition) at page 1397, 'vested' is defined as Law held by a tenure subject to no contingency; complete; established by law as a permanent right; vested interest. (Vide: Bibi Sayeeda v. State of Bihar ; AIR 1996 SC 516; and J.S. Yadav v. State of Uttar Pradesh : (2011) 6 SCC 570)*
>
> *13. Thus, vested right is a right independent of any contingency and it cannot be taken away without consent of the person concerned. Vested right can arise from contract, statute or by operation of law. Unless an accrued or vested right has been derived by a party, the policy decision/scheme could be changed. (Vide:Kuldip Singh v. Government, NCT Delhi : AIR 2006 SC 2652).*

206. The aforesaid decision was considered in ***Secretary to Government Department of Education (Primary) and Ors. v. Bheemesh Alias Bheemappa*****; 2021 SCC Online SC 1264** in which after considering all the decisions with regard to the scheme that would be applicable to the

legal heirs of a deceased in the die-in-harness category, it was observed that in cases where benefit under the existing scheme was taken away or substituted with a lesser benefit the Hon'ble Supreme Court in its earlier decisions directed the application of the new scheme, but in cases where the benefits under an existing scheme were enlarged by a modified scheme after the death of the employee, this court had applied only the scheme that was in force on the date of death of the employee. This is fundamentally due to the fact that compassionate appointment was always considered to be an exception to the normal method of recruitment and perhaps looked down upon with lesser compassion for the individual and greater concern for the rule of law.

207. In ***State of M.P. & Anr. v. Shakri Khan*; 1996(8) SCC 648** the issue was with regards to the entitlement of an incentive scheme introduced after the respondent was appointed. The government had introduced a scheme of granting two advance increments for the Lower Division Clerk who passed Hindi typewriting test. They prescribed the last date for passing the test as 30th July, 1973 and those who passed the Hindi typewriting test prior to that date were declared eligible to get two advance increments. The respondent passed the test in December, 1979 and based his claim on the basis of certain instructions issued from time to time that is between 20th April, 1974 and 15th January, 1979. The Hon'ble Supreme Court agreed with the State that the Government having had the power to extend the benefit it also has the power to put a cut off date. Consequently, the cut off date, that is, 30th July, 1973 for passing the test is a proper

classification. It was held that all those who did not pass the test prior to the date but appointed earlier to the date are not eligible to two advance increments on their passing the said test after the cut off date. This judgment was cited by the Learned Advocate General to demonstrate the ineligibility of candidates who were appointed in a pass-graduate category and obtained higher qualification in the course of their employment. They cannot question at this stage that they should be treated at par with the candidates who have been recruited as Honours Graduate or Post Graduate.

208. The decision in FMA 2368 of 2015 (***State of West Bengal & Ors. v. Gautam Ghosh & Ors.)*** decided on 5th April, 2019 was relied upon to show that the date of issuance of provisional certificate and the convocation are different. The date of convocation shall be relevant. The paragraphs relied upon are:

> *"We would have had absolutely no difficulty in allowing the additional benefit to the respondent no. 1/petitioner if the Rules had enabled the said respondent no. 1 to claim for higher scale of pay from the date of acquisition of the degree. We are in respectful agreement with the view expressed by the Division Bench that for the purpose of acquisition of doctorate degree the date of provisional certificate should be the relevant date. However, paragraph 12 (5) of ROPA 1998 says that a teacher acquiring a doctorate degree shall be entitled to the benefit of two additional increments from the date of the convocation on which the degree is awarded. When the law based on which a claim is made fixes the period from which a benefit can be claimed it cannot be altered by giving an interpretation on when a degree is acquired by a candidate. That will be altering the*

provisions of the relevant Rules. If the date of convocation is the only relevant date and if the Rules stipulate that the date of convocation is the date on which the degree is awarded whether in a given case it can be said that a candidate had acquired the degree before, becomes a consideration not very relevant for the purpose. It must 6 be remembered that acquisition of qualification and awarding of degree are two different things and paragraph 12(5) of ROPA 1998 fixes the date from which such claim can be made to the date of convocation which has been recognised as the date when the degree is awarded.

In the present case, the convocation was held on March 9, 2006 when ROPA 1998 was not in operation. The petitioner has claimed additional benefits on the basis of ROPA 1998. Therefore, the Rules on which the claim is made must be in existence on which he has acquired the qualification and after the introduction of ROPA 1998 with effect from January 1, 2006 ROPA 1998 had ceased to be in existence on the date the convocation was held and the date on which the degree was awarded upon the petitioner. Since the Rules themselves had ceased to exist on the date the degree was awarded the petitioner/respondent no. 1 must be held to be ineligible that the benefits claimed by him under ROPA 1998.

We agree with the learned Single Judge that the Act does not contain any provision which disentitles the petitioner from claiming the benefit. While holding this the learned Single Judge was also required to clarify that if the Act does not contain any bar where lay the source of the petitioner's entitlement. That entitlement was in ROPA 1998 which was not examined by the learned Single Judge.

Thus, we have no alternative to hold that the respondent no. 1/petitioner is not entitled the benefit."

209. However we are not agreeing with the view that the conferment of degree of the convocation would be the relevant date for the reasons we have already indicated.

210. In ***Director of Treasuries in Karnataka & Anr. v. V. Somyashree*** reported in **AIR 2021 SC 5620** the Hon'ble Supreme Court was considering the entitlement of a divorced daughter to be considered for compassionate appointment. It was held that at the relevant time when the employee died and when applicant made an application for appointment on compassionate ground, divorced daughter, was not within the definition of dependent and hence not eligible for appointment on compassionate grounds.

211. We are faced with two apparently conflicting decisions of two Division Benches with regard to entitlement of a teacher who was appointed in pass category and thereafter enhanced his qualification during his employment would be entitled to a higher scale of pay. The initial appointment for the post is under "pass category".

212. In ***Tarak Chandra Roy*** (*supra)* the question for consideration was:

"After the School Service Commission Act, 1997 came into force would the appointees get the benefit of the higher scale of pay despite being interviewed and selected in pass category".

213. The selection test was only in pass category. There was no vacancy in the post of Honours graduate/Post graduate teacher in the physical education. Admittedly, Tarak was a post graduate degree holder in physical science and in 1998 when he participated in the selection process for educational teachers there was no vacancy in the post of Honours graduate/Post graduate teacher.

214. The learned Single Judge dismissed the writ petition on the ground that after the Act of 1997 came into force there had been different categories for appointment and extension of benefit of higher scale of pay because improvement of qualification is no more permissible.

215. Tarak joined the school on 23rd March, 1999 as an assistant teacher in physical education. The appointment was duly approved by the District Inspector of School. On 27th September, 2001 Tarak made a representation to the DI for the grant of Masters Degree scale of pay. The representation was not considered for which a writ petition was filed being WP 449(w) of 2003. This writ petition was disposed of on 25th January, 2003 by directing the Secretary of Managing Committee of the school to pass a reasoned order after hearing. The Managing Committee in its meeting held on 22nd February, 2003 recommended the case of Tarak for higher scale of pay to the District Inspector of School. The DI rejected the recommendation. The contention of Tarak was that he acquired Masters Degree in Physical Education before qualifying in the School Service Commission that is prior to March in 1999, and claimed higher scale of pay in terms of **Government Order No.417-SE(S)/5P-33/98** dated 8th March, 2000.

216. This order provides that the higher scale of pay would be admissible to those physical education teachers who have obtained such higher post graduate degree on completion of two years regular course from a recognized University. The petitioner having completed the post graduate qualification from a recognized university claimed higher scale of pay under the aforesaid circular. This circular was issued in modification of the earlier circular, i.e. **G.O. No.796-Edn(S)/5P-78/93** dated 22nd November, 1993 where the benefit of higher scale of pay to the Physical Education teachers of the Secondary School and Junior High Schools including those of Madrashas of various types having Masters Degree in Physical Education from a recognized University was allowed.

217. Tarak claimed to be qualified under both the circulars for the higher pay scale. Tarak claimed that having acquired the higher qualification earlier to being selected, the promulgation of the enactment of West Bengal Schools (Control of Expenditure) Act, 2005 would not be applicable as the vested rights of the petitioner could not be taken away.

218. The respondents contended that the circular dated 22nd November, 1993 has no manner of application in respect of assistant teacher of physical education appointed on the recommendation of the commission subsequent to the 1997 Act. Similarly, the Circular dated 8th March, 2000 has no manner of application as it is merely clarificatory of the Circular dated 22nd November, 1993. Moreover, Tarak participated in the selection test of 1998 in pass graduate category and he was appointed as an assistant teacher in the pass category. He again participated in another

selection test in the year 2002. His name was again recommended on the basis of the fresh recommendation. He again joined in the same post but in a different school with the approval of the DI on 22nd April, 2003. The scale of pay of the petitioner was fixed in terms of Government Order dated 12th February, 1999 and 13th July, 1999 and the later categorically provides that if a teacher is appointed by the Commission his pay would be fixed in the scale of pay as per his qualification as mentioned by the said Commission. Tarak having been appointed in the pass category clearly, therefore, could not claim benefit of his post graduate qualification.

219. On such consideration the Hon'ble Division Bench presided over by the then Chief Justice of the Calcutta High Court held:

> *"We have considered the submission made by the learned counsel. In our opinion, the petitioner being an appointee subsequent to the promulgation of the West Bengal Service Commission Act, 1997 cannot be given the benefit of Circular dated 22nd November, 1993 and 8th March, 2000. Petitioner having been appointed as Assistant Teacher pass category can only get the pay scale specified by the commission for that post. Even otherwise the benefit of Circular dated 22nd November, 1993 and 8th March, 2000 would not confer any vested right upon the Assistant Teachers. NO such right has been protected under the West Bengal Schools (Control of Expenditure) Act, 2005. In view of Section 14 of the 2005 Act no graduate category teacher is entitled to claim any additional increment for acquiring any qualification than the qualifications specified for such post. The provision in Section 16 would not be applicable to aid the claim of the petitioner as by virtue of Section 20 of the 2005 Act the Circulars and orders existing previously stand abrogated.*

That being the position of law, the petitioner would not be entitled to claim higher scale of pay. We, therefore, dismiss the writ petition." (emphasis supplied)

220. The Special Leave Petition being SLP (Civil)… CC No.5406 of 2009 was dismissed on 4th May, 2009.

221. In ***Sampa Sahu v. State of West Bengal*** (W.P. No. 15866 of 2000), the learned Single Judge took note of the decision of the Division Bench in this manner:

"28. Be it noted that the Division Bench was concerned with the case of a teacher of Physical Education. The requisite minimum qualification for all posts of teachers of Physical Education is Pass Graduate. Therefore, no case was made out before the Division Bench of discrimination between two sets of teachers performing the same duties and functions and possessing the same educational qualification."

222. Tarak was decided on 17th of January, 2008.

223. Subsequent thereto, on 8th April, 2008, ***Sauvik Ghosh & Ors.*** (*supra)* was decided by another Division Bench in which same issue came up for consideration. The facts are little different. Unlike Tarak, Sauvik passed the Bachelor of Physical Education in the first class from the University of Kalyani in 1999. Thereafter he took admission in the two year post graduate course conducted by the University of Kalyani.

224. In 1999 he appeared in the Regional Level Selection Test (in short 'RLST') conducted by the West Bengal School Service Commission for appointment as Assistant Teacher of Physical Education in aided non-

government schools. He cleared the selection test. He was recommended for appointment by the Commission on 8th March, 2001 to the post of assistant teacher of Physical Education in an aided non-government secondary/higher secondary school. At the material point of time when he was appointed to the school he had appeared for the Masters of Physical Education final examination but the result was published on 22nd September, 2001 after he was appointed.

225. On successful completion of the Masters in Physical Education Sauvik made a representation to the District Inspector of Schools concerned for re-fixation of the pay in the higher post graduate scale. The Director of school education refused to grant post graduate scale of pay.

226. This has resulted in a writ petition being filed by Sauvik. The writ petition was allowed and the authorities concerned were directed to fix the scale of pay by granting him the higher post graduate scale of pay.

227. This order was under appeal.

228. The main ground urged in the appeal was that the learned Single Judge ignored the **Government Order No.155-SE(B)** dated 13th July, 1999 in terms whereof the post graduate scale of pay can only be granted to teachers appointed to posts for which the requisite qualification is a post graduate degree. Moreover, a teacher appointed through the School Service Commission could, in terms of the said Government Order, be given the scale of pay pertaining to the qualification as recorded by the School Service Commission in its recommendation.

229. The said judgment was also challenged on the ground that such direction is contrary to the 2005 Act, and in particular Section 14(2) of the said Act which provides that every teacher of a school, who is appointed in a post of the graduate teacher category, shall be entitled to draw the scale of pay of the graduate teacher and shall not be entitled to claim any additional increment or higher scale of pay for acquiring any qualification, other than the qualification specified for the post.

230. The Hon'ble Division Bench posed the following question for determination in the appeal:

> *"The question is, whether teachers appointed after 13th July, 1999 and/or teachers who improved their qualifications after 13th July, 1999 can be denied the scale of pay pertaining to their higher qualification, either on the ground, that the School Service Commission, concerned did not mention the higher qualification in its recommendation or on the ground that the higher qualification was not necessary for the teaching post held by the concerned teacher, having regard to the approved staff pattern of that school."*

231. The Hon'ble Division Bench while acknowledging that the Government has power to issue orders and orders lawfully issued by the government would have the force of law, has however, held that a government order which contravenes a fundamental right guaranteed under the Constitution would be null and void. The School Service Commission is required to act fairly, reasonably and in accordance with law. The School

Service Commission is obliged to record correctly the education qualification of the candidates as disclosed, subject however, to verification.

232. The School Service Commission cannot omit or ignore educational qualifications as disclosed by a candidate which could be higher to the qualification required for the post and the commission might choose not to give any credit for such higher educational qualification other than the requisite educational qualification for the teaching post for the purpose of selection but cannot describe a candidate with post graduate degree as a graduate in any communication.

233. The government order dated 13th July, 1999 was interpreted as follows:

> *"From the language and tenor of the Government Order dated 13th July, 1999, it is apparent that the recommendation of the School Service Commission applies to initial fixation of pay and not to refixation upon enhancement of educational qualifications or otherwise. If there is any discrepancy between the actual educational qualification and the educational qualification mentioned in the recommendation of the School Service Commission, the actual qualification would have to be taken into account. From the language and tenor of the same Government Order there does not appear to be any bar to grant of higher scale of pay to a teacher recommended through the School Service Commission, who has later enhanced his/her qualifications. If, as argued on behalf of the State, the Government Order dated 13th July, 1999 were to mean, initial fixation would be on the basis of the educational qualifications mentioned in the recommendation of the School Service Commission, irrespective of whether the*

qualifications had correctly been recorded or not, and a teacher appointed on the recommendation of the School Service Commission would be bound by the qualification as mentioned in the recommendation for all time to come, and even on enhancement of qualification, the teacher would not be entitled to the higher scale of pay pertaining to qualification, only because the School Service Commission had mentioned a different qualification in its initial recommendation, the Government Order would have to be struck down as totally arbitrary, discriminatory and violative of Article 14 inter alia for the reasons elaborated hereinafter."

234. The relevant Government Orders regarding the staff pattern of schools **G.O. Nos.772-Edn.(S)** dated Calcutta the 8th July, 1974; 403-SE (S) dated Calcutta the 3rd February, 1992 and 670-SE(S) dated Calcutta the 4th September, 1998, were also considered in the light of the subsequent government orders and the 2005 Act and it was held that there could be no reason as to why different qualifications have been fixed for the same teaching posts, involving the same teaching duties. The Government Orders pertaining to staff pattern have nothing to do with salary and allowances. Salary and allowances are fixed on the basis of separate Rules for Revision of Pay and Allowances framed from time to time.

235. The State is certainly competent to classify teachers on the basis of qualifications, responsibilities, duties, length of service and the like for the purpose of fixation of their pay and allowances. The classification must, however, meet the test of reasonable nexus with the object sought to be achieved by the classification.

236. The Hon'ble Division Bench found that there is no rational criteria for fixation of different qualification for different teaching posts which had nexus with the duties and responsibilities pertaining to teaching posts. It was observed: "Where all assistant teachers constitute a single class and as per the government orders pertaining to salary and allowances of their scales are to be fixed on the basis of qualifications in the relevant teaching subject, payment of different scales to two teachers with the same qualifications, teaching the same subjects in the same classes, in the same or in different aided non-government schools or Madrasahs and thus equally circumstanced, on the basis of a sham classification based on the requisite qualification for the teaching post, as per the approved staff pattern, which is in no way related to the duties and responsibilities pertaining to the teaching posts, amounts to denial of equal pay for equal work and offends Article 14 of the Constitution of India. It is immaterial that separate selection tests are conducted by the School Service Commission for posts earmarked for Pass Graduates and posts earmarked for Honours Graduates/Post Graduates."

237. The conclusions are:

> "The Government Order dated 13th July, 1999 in so far as the same provides that teachers who improve their qualifications or are appointed with higher qualifications in subjects relevant to their teaching, would get higher scale of pay provided the higher qualification was a requisite qualification for the post as per approved staff pattern of the school is patently, discriminatory

and violative of Article 14 of the Constitution of India for reasons stated hereinabove.

As observed above, the order dated 13th July, 1999 is prospective. The said order discriminates between teachers who improved their qualifications and/or were appointed with higher qualifications before 13th July, 1999 and those who improved their qualifications and/or were appointed with higher qualifications after 13th July, 1999 without rational justification.

Teachers who were appointed with higher qualifications or improved their qualifications before 13th July, 1999 continue to get the higher scale of pay irrespective of the qualification for the post. Therefore, even in case of teachers, with higher qualifications, holding posts for which the higher qualification is not necessary, one set of teachers would get the higher scale of pay pertaining to actual educational qualification and the other set would get the scale pertaining to the qualification fixed for the post, though both sets are of equal status and required to discharge the same duties and responsibilities."

238. Justice Indira Banerjee as Her Ladyship then was before Her Ladyship's elevation as the Chief Justice of Madras High Court and subsequently to the Hon'ble Supreme Court of India authored the aforesaid judgment and in a subsequent decision in Sampa Sahu (Mondal) (supra) revisited the issue upon consideration of Tarak Chandra Roy (supra) in paragraphs 21to 29. The said paragraphs read:

"(21) The staff pattern of Schools including Madrasahs were, at all material times governed by Government Circulars and/or Orders issued in this regard from time to time. The relevant Government

Orders Indicate that qualifications for the same teaching post were to be fixed percentage wise. Out of two posts of Language Group teachers in a Junior High School, the minimum requisite qualification for one post was Pass Graduate and the minimum requisite qualification for the other Honours Graduate/Masters degree. When additional posts were sanctioned, the same percentage ratio was maintained. Thus, if a School was sanctioned two posts of Bengali Teachers who were required to teach Bengali in the same classes, the minimum requisite qualification for one post could be Pass Graduate and the minimum qualification for the other post could be Honours/Masters degree in Bengali.

(22) There were teaching posts in Junior High Schools/Madrasahs for which the requisite qualification was Pass Graduate and there were teaching posts, also, in Junior High Schools/Madrasahs for which the minimum qualification was Honours Graduate and/or Post Graduate degree. The fixation of a higher qualification for some posts and lower qualification for others, apparently had nothing to do with the teaching duties pertaining to the post, at least at the material time.

(23) It also appears that although there has recently been some change in the rules of appointment through the School Service Commission, at the material time, Honours Graduates and Pass Graduates had to compete in a common selection test.

(24) In the aforesaid circumstances, the payment of scale pertaining to qualification to one teacher and denial of scale pertaining to qualification to another teacher, teaching the same subject in the same class in the same school or in different aided recognized Non-Government schools would violate the principle of equal pay for equal work and offend Article 14 of the Constitution of India.

(25) If the minimum requisite qualification for some posts of Assistant Teachers of Language Group was B. A. (Honours) and/or M. A degree, the minimum qualification for the teaching post for the aforesaid category could have to be deemed as B.A. (Honours)/M.A. degree.

(26) Mr. Bhattacharya, learned Advocate appearing on behalf of the State cited a Division Bench judgment of this Court in Tarak Chandra Roy v. State of West Bengal and Ors., reported in 2008(2) Calcutta Law Times 240 (HC).

(27) In the aforesaid case, the Division Bench was of the view that after the enforcement of the West Bengal School Service Commission Act, 1997, the circulars dated 22nd November, 1993 and 8th March, 2000 pertaining to teachers of Physical Education had no manner of application.

(28) There could be no doubt that the salary might be fixed on the basis of scale of pay as mentioned by the School Service Commission, upon verification of mark sheets and certificates, as there is s presumption of correctness in the same. However, in the instant case, it appears that the School Service Commission has not recorded the academic qualification of the petitioner correctly.

(29) Be it noted that the Division Bench was concerned with the case of a teacher of Physical Education. The requisite minimum qualification for all posts of teachers of Physical Education is pass graduate. Therefore, no case was made out before the Division bench of discrimination between two sets of teachers performing the same duties and functions and possessing the same educational qualification."

239. Another Division Bench considered the same issues in **Md. Sohidullah & Ors. (FMA 583-585 of 2006)** decided on 16th November, 2007 and 22nd November, 2007.

240. Three appeals were disposed of by the said judgment. The writ petitioners were Md. Sohidullah, Smt. Nirupama Bairagi and Shyam Sundar Mahanto.

241. Sohidullah was a post graduate degree holder in Zoology. He competed for the post of assistant teacher in Zoology in pass graduate in the northern region. At the relevant time there were 13 main vacancies in Honors/Post graduate category. Although he was post graduate degree-holder, to secure the employment he competed for the pass category.

242. Nirupama was B.SC (Hons.) in Geography and she also competed for the pass category and she was selected as such. She subsequently obtained post graduate degree. However, she was not allowed post graduate scale of pay as she was not selected in Honors/Post graduate category to have the benefit of circular dated 3rd June, 2002.

243. Shyam Sundor was a candidate under died-in-harness category, he was admittedly pass graduate. He competed for the post in pass graduate. He later improved his qualification by obtaining post graduate degree. He passed out M.A. Part I from Burdwan University (correspondence course) prior to his selection in the post. After joining he applied for permission to sit for M.A. Part II examination. The Managing Committee forwarded his application to the DI Schools. The DI by a letter dated 13th

June, 2003 asked for qualification from the higher authority being Director of School Education. However, no such qualification had come from the said Director. Shyam sat for the examination and successfully obtained post graduate qualification. However, he was not given the benefit of higher scale of pay on the ground that he was selected in pass category.

244. The learned Single Judge allowed the writ petition on the reasoning that there cannot be any discrimination between the teachers obtaining higher qualification being appointed prior to the School Service Commission Act coming into force and the teachers appointed through School Service Commission.

245. On behalf of the writ petitioners it was argued that Circular dated 12th February, 1999, 13th July, 1999 and 13th June, 2002 are in the nature of incentives to the teaching staff who wanted to improve their qualifications and hence there cannot be any discrimination between the pre 1997 appointees and post 1997 appointees.

246. The staff pattern is for administrative convenience and cannot in any way deny equal pay for equal work and appropriate pay should be given in accordance with the admitted qualification. The discrimination, sought to be created by way of staff pattern violates the basic principles of Article 14 of the Constitution and as such, is illegal.

247. The circulars are ambiguous as it did not clearly extend the benefit to the post 1997 appointees. Hence, beneficial interpretation should be given in favour of the grantee being the teaching staff in question.

248. On behalf of the State it was argued that the State as a matter of policy wanted to give incentives to teachers who wanted to acquire higher qualification for the betterment of the students at large, however, such benefit is restricted to teaching staff appointed prior to the School Service Commission Act, 1997 coming into force. The government as a policy decision categorized the post of teaching staff in different educational institutions.

249. The State relied upon the decision of the Hon'ble Supreme Court in ***Haryana v. Haryana Civil Secretariate Personal Staff Association*** reported in **AIR 2002 SC 2589** where the writ petitioners have relied upon the decision in ***Government of West Bengal v. Tarun Kumar Roy & Ors.*** reported in **2004 (1) SCC 347** and ***Union of India & Ors. v. Kaumudini Narayan Dalal & Anr.,*** reported in **2001 (10) SCC 231.**

250. The Hon'ble Division Bench has decided the appeal in favour of the State save and except the matter relating to Shyam Sundor Mahato. The reasoning in short is that prior to the 1997 Act educational institutions should appoint teaching and non teaching staff directly subject to the approval of State when aid was extended to such institutions by the State. At the relevant time, for the teaching staff, graduation is the minimum eligible qualification. The State has its financial constraints. It has to allocate funds as per revenue collection and other financial resources. When any financial benefit is extended by the State the State must have say in the same matter. The State despite their constraint as a matter of policy wanted to give incentive to the teaching staff who were appointed prior to 1997

appointees, so that they acquired higher qualification for the benefit of the students at large.

251. The Hon'ble Division Bench did not find any ambiguity and/or inconsistency in the three circulars. In reference of the first circular dated 12th February, 1999. It was observed:

> *"The first circular dated February 12, 1999 clearly provides that higher pay scale would be given to the teaching staff who would improve or have improved his/her qualification. It means, a teaching staff who had acquired higher qualification after his appointment, was only entitled to such benefit. This benefit was given with effect from January 1, 1996. Hence, School Service Commission appointees cannot come within the zone of consideration in any way. In the second circular dated July 13, 1999 it was provided that School Service Commission appointees would get their pay fixation as per their qualification so intimated by the Commission. The benefit was also extended on and from January 1, 1996 therein. The third circular makes it more clear where identical benefit was given for the post 1997 appointees who appeared in post-graduate examination prior to appointment and was selected in Honours category and the result was not published till his/her appointment.*
>
> *On a combined reading of three circulars we feel that although Shohidullah and Nirupama did have requisite higher qualification being postgraduate and honours, as the case may be, they chose to compete for the pass category. Hence, they are not entitled to the benefit of the higher pay scale.*
>
> *The State is funding the schools by providing inter alia the salary for the teaching staff. They have their financial scheme through their annual budget. They prepare their budget as per financial*

resources they have in their hands. They, in their wisdom, wanted to give additional incentives to those teaching staff, who wanted to acquire higher qualification which would ultimately enure to the benefit of the students at large. However, the teachers who already had higher qualification and did not utilize such qualification at the time of entry in service, they cannot get benefit of those circulars and in our view, the State is right in denying such benefit to those teaching staff.

It is true that in the case of Sohidullah his qualification was not mentioned in the recommendation made by the Commission. We feel that this was a mistake on the part of the Commission. Shohidullah did disclose his postgraduate qualification in his application. He however, despite mentioning such higher qualification, had chosen to compete in pass category. Hence, the Commission while recommending him should have mentioned his post-graduate qualification coupled with a note that he was selected in pass category as applied for.

In such view of the matter, Sohidullah is not entitled to claim postgraduate scale as he was selected in pass category on the basis of his application. The learned Judge, in our view, erred in allowing the writ petition of Sohidullah.

In the case of Niruparna it is true that she obtained post-graduate qualification after she was selected for the post. She also despite having honours qualification, did choose to compete in pass category. Hence, she was also not entitled to benefit of the circular dated June 3, 2002. She had honours in Geography. She should have competed in honours/post-graduate category. Had she done so, she would have been entitled to post-graduate scale after acquiring the same in course of her service.

Hence, in our view, Niruparna should also be denied post-graduate scale on the same logic for which we deny benefit to Sohidullah. We feel that the learned Judge erred in allowing her writ application." (emphasis supplied)

252. The Hon'ble Division Bench has noted that in paragraph 9 and 10 of the decision in the case of State of Haryana (*supra*) the Apex Court observed that equation of post, determination of pay scale and other allied decisions should be left to the executive and not open for judicial review.

253. In the case of ***Government of West Bengal*** (*supra*) the Apex Court in paragraph 14 of the decision observed, "the holders of a higher educational qualification can be treated as a separate class. Such classification, it is trite, is reasonable. Employees performing the similar job but having different educational qualification can, thus, be treated differently."

254. The Hon'ble Division Bench has also noted that the three circulars have not been challenged by the writ petitioners. We are of the view that ratio in Md. Sohidullah & Ors has correctly interpreted the aforesaid three circulars.

255. A Hon'ble Bench in FMA 557 of 2007 (***Baisali Banerjee v. The State of West Bengal & Ors.*** decided on 10th March, 2008) had considered the claim of a post graduate degree holder in physical education for a higher scale of pay. At the time of her selection for the post of physical education her post graduate result was yet to be published.

256. The School Service Commission recommended her as a physical education teacher as a pass graduate. After declaration of result she applied for higher scale of pay which was denied by the State. Identical question arose in ***Bhaskar Chakrabory v. State of West Bengal & Ors. (****W.P.2326 (W) of 2002)* allowing the writ petition and directed the extension of post graduate scale of pay to the writ petitioner who was identically circumstanced with Baisali. The State accepted the said order and extended the benefit to Bhaskar.

257. The State has objected to the grant of higher scale of pay in view of Section 14 of 2005 Act as the qualification recorded by the School Service Commission and mentioned in the respective letters of recommendation mentioned Baisali as a pass graduate. The prayer of Baisali was allowed on the following reasoning:

> *"Prior to 1996 the State from time to time extended the benefit of higher pay scale to the teachers who acquired post graduate qualification in course of service. Initially such extension was restricted to subject relevant to his/her teaching. The said rule was relaxed and the post graduate degree holders, being pre-1996 appointees were all extended post graduate scale. Such benefit was given by the State probably to encourage the teaching staff to improve their qualification for the welfare of the student. Our attention has not been drawn to any other reason for extension of such benefit by the State counsel. If that be the position there could not be any distinction between Pre 1096 appointees and Post 1996 appointees.*

The appellant is a Physical Education teacher. There is no honours course taught by any of the Universities in the State. Hence there could be no such category in the School Service Commission in the concerned subject. We also do not find any such distinction being made in Physical Education by the School Service Commission. Hence all candidates who are having appropriate qualification in Physical Education are considered in one category i.e. pass category. If that be the position their subsequent acquisition of post graduate qualification cannot be equated with any other subject.

In the instant case the appellant undertook post graduate study. She appeared in the post graduate examination. Before the result could be published she was selected and appointed in the post. In the case of Bhaskar Chakraborty (supra) the identical situation happened. Hence in our view, the appellant was entitled to the benefit of the higher pay scale.

Let us now examine the said Act of 2005 to find out whether there is any hindrance in the way of extending higher pay scale to the appellant. Appellant was appointed in 2001. She acquired post graduate qualification in 2001. Hence she was to be considered contemporarily. Her case was unnecessary kept pending. Her prayer could not be considered to her disadvantage under the provisions of the said Act of 2005 in this regard. Learned Counsel appearing for the appellant has successfully drawn our attention to Section 16 wherein it is provided that notwithstanding anything contained in the said Act, the terms and conditions of service of a teacher shall not be varied to his or her disadvantage in the view of the commencement of the said Act.

In Circular dated June 03, 2002 the State considered the cases of the candidates who were undergoing post graduate studies

or had appeared at the post graduate examination but result was yet to be published. Those candidates, if selected, in honours category were extended post graduate scale after acquiring post graduate qualification. Since in Physical Education there is no such distinction between pass category and honours category the benefit of the circular dated June 03, 2602 should be extended to the Physical Education teachers being similarly circumstanced with Bhaskar Chakraborty (supra) and the present appellant.

The State is directed to consider the prayer for extension of the higher pay scale in the light of the observations made herein."

258. In our considered opinion the acquiring of higher qualification does not create a fundamental right nor does it create a vested right.

259. In ***Zahoor Ahmad Rather & Ors. v. Sheikh Imtiyaz Ahmad and Ors***. reported in (2019) 2 SCC 404 in discussing the scope of judicial review in policy matter involving prescribed qualifications it was held:

"26…It is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications. Similarly, equivalence of a qualification is not a matter which can be determined in exercise of the power of judicial review. Whether a particular qualification should or should not be regarded as equivalent is a matter for the State, as the recruiting authority, to determine...

27. While prescribing the qualifications for a post, the State, as employer, may legitimately bear in mind several features including the nature of the job, the aptitudes requisite for the efficient discharge of duties, the functionality of a qualification and the content of the course of studies which leads up to the

acquisition of a qualification. The State is entrusted with the authority to assess the needs of its public services. Exigencies of administration, it is trite law, fall within the domain of administrative decision-making. The State as a public employer may well take into account social perspectives that require the creation of job opportunities across the societal structure. All these are essentially matters of policy. Judicial review must tread warily…"

260. In ***The State of West Bengal v. Ganesh Chandra Samanta and Ors.,*** decided on 29th November, 2023 a Division Bench constituting of one of us (Soumen Sen, J.) in considering the claim of the appellant Workshop Instructors for higher scale of pay under ROPA Rules, 1981 on the principle of equal pay for equal work observed:

"86. The Courts have consistently held that even if the nature of the work involved in two posts may sometime appear to be more or less similar, however, if the classification of the posts and determination of pay scale have reasonable nexus with the objective or purpose sought to be achieved, the pay commissions would be justified in recommending and the State would be justified in prescribing different pay scale for the seemingly similar posts.

87. The power of judicial review in the matter involving financial implications are also very limited. The Courts have over the years given due credence to the wisdom of the pay commission and not interfered with such policy matters involving financial implications unless a gross case of arbitrariness or unfairness are established.

88. The principle of equal pay for equal work has no mechanical application in every case and Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together as against those who have left out. A classification based on difference in educational qualifications and processes of recruitment justify a difference in pay scale. (see ***State of Bihar vs. Bihar Secondary Teachers Struggle Committee*** reported in **(2019) 18 SCC 301**)."

261. When the post for which appointment is made, does not require a candidate with Honours or Post graduate degree the state cannot be saddled with the financial burden of paying enhanced scale of pay for teachers with higher qualification. In fact candidates with Honours graduate/post graduate category would be over qualified for the classes for which they are appointed based on staff pattern. It was for this reason while laying down the eligibility criteria the authorities take into consideration the suitability of the candidate for the post.

262. The State is required to make budgetary allocation to meet salaries and other allowances extended to teachers. The State cannot be asked to pay enhanced scale of pay to a teacher for acquiring higher qualification in the course of his employment or who had consciously participated in a selection process which does not require a higher qualification for the said post. If a teacher has consciously applied for a post under the pass graduate category in spite of having an Honours Graduate/Post Graduate qualification he/she/they cannot claim as a matter of right higher pay scale in view of the Government Orders dated 13th July,

1999. Re-fixation of salary has to be decided on the basis of the extant rules. The change in policy if not arbitrary or affecting a vested right or a fundamental right should not be interfered with keeping in mind that such change in policy has been necessitated by reason of change in circumstances. An expert body conversant with the relevant rules, realities and requirements of the students and educational institutions has framed rules. Statutory orders have been issued to implement the Act and the rules framed thereunder.

263. The re-fixation of higher scale of pay as considered in Sauvik was possibly confused with a claim for increments or incentives which may, in a given circumstance, be considered not on the basis of a fundamental or a legally enforceable right but on an expectation.

264. If one scrutinized the ROPAs since 1970s and the several government orders issued in between it would appear that the government has emphasized that the higher qualification should be in the relevant subject with few exceptions like Government order dated 27th January, 1995 extending certain financial benefits by way of increment to Assistant teacher alleging higher scale of pay even if their initial appointments were in different group/subject which we feel was issued primarily to mitigate the hardship caused to the educational institutions and the students by reason of delay in approving teachers in time.

265. The claim of higher pay scale on acquiring higher degree cannot be considered to be a vested right and elevated to a legal right. It is no more

than a reasonable expectation. However, such expectation must arise from the course of dealings and conducts.

266. The State Government has recognized CAS which is in the nature of incentives which can be extended to teachers acquiring higher qualification but it cannot be claimed as a matter of right. The state has to assess if on acquisition of higher qualification by a teacher it would benefit the educational institutions and the students.

267. It is true that while the teacher may not claim as a matter of right that having joined the institution in the pass graduate category he would be entitled to receive higher scale of pay at par with teachers who have been recruited for the Honours graduate/Post graduate category in view of different recruitment rules and object and purpose for such recruitment, however, can claim, a reasonable approach from the State to consider suitable increments in view of stagnation and lack of opportunity for promotion. Undoubtedly, a teacher with a better and higher qualification can be an advantage to an educational institution and it is expected that the teacher should not be deprived of increments and/or incentives.

268. At the same time as we have observed earlier, it cannot encourage a backdoor entry for teachers who have joined in the pass graduate category and thereafter on improvement of their qualification claim higher scale of pay.

269. Even if the School Service Commission records the qualification of a candidate as Honours graduate for the recruitment in the pass graduate

category, the recommendation in a pass graduate category by the Commission can only be for the said category for the simple reason that for the said post, Honours and/or Post graduate category candidates are not required and the recruitment process for Honours/Post graduate category is different.

270. There could be instances where an Honours graduate or post graduate candidate may suppress qualification and participate in the selection process in the pass graduate category and take the easy path and avoid competing with candidates who are Honours graduate and/or Post graduate for the selection to Honours and/or Post graduate category with the hope to utilize such degree after joining to claim higher scale of pay.

271. The prospective operation of the 2005 Act would also be clear from Section 14(3) of the 2005 Act. All other circulars existing prior to the 2005 Act in relation to financial benefits upon acquiring higher qualification are required to be considered in accordance with rules existing when an application seeking permission for pursuing higher education and recommendation of the Managing Committee is made. The rights of the parties are required to be decided on the basis of the Government order and circulars existing on that date. The Act does not take away such right as the said Act is prospective in nature. The said provision cannot affect any right that has accrued or crystallized in favour of a teacher on the basis of the government order or circulars issued prior to the 1997 Act has come into operation.

272. On the basis of the aforesaid discussion we answer the reference in the manner following:

a). Enhancement of pay on acquisition of higher qualification during the service career is dependent upon the relevant rules operating at the time of acquisition of higher qualification and cannot be claimed as a matter of right in absence of Rules.

For example, a teacher joined the school with a pass graduate degree and during his service career the teacher enhanced his qualification and claimed higher scale of pay on the basis of the said degree. The said claim has to be decided on the basis of the relevant rules existing at the time of his acquiring higher qualification. If he has joined the school with a pass graduate degree after the government circular dated 12th February, 1999 he would not be entitled to post graduate scale of pay unless the teacher is covered by the **Government Order No. 735-SE(S)/SP-132/2002** as revised by the **Circular No.134-SE(S)** dated 3rd November, 2004. Any other interpretation would encourage a back door entry. A teacher upon acquiring higher qualification can always compete in the recruitment process for a post commensurate with the higher qualification and therefore the question of stagnation does not arise. However, the State shall formulate a scheme for incentives to teachers who may have joined the school with a pass graduate degree but enhanced his/her qualification with the permission of the Managing Committee and the D.I irrespective of the staff pattern as such incentive would encourage teachers to perform better and it will act as a cushion against stagnation.

b) We answered the question in the negative.

c) Vires of Section 14 and 20 of the West Bengal School (Control and Expenditure, Act), 2005 is not under challenge. The ground of

challenge was that persons who have received benefits earlier under court orders or by the government, could they have been denied similar benefits to persons similarly placed. In absence of pleading to the effect that the said Rules are ultra vires this issue cannot be decided. [See ***Union of India v. E.I.D. Parry (India) Ltd.*** **2000(2) SCC 223**]

d) We are of the view that ***Tarak Chandra Roy*** (*supra*) has been correctly decided. We are of the view that ***Tarak Chandra Roy*** (*supra*) has to be read along with the Government Order dated 3rd June, 2002. However, the said judgment has to be read with the Order No.735-SE(S) SP-132/2002 as revised by the Circular No.134-SE(S) dated 3rd March, 2004. The said judgment has also to be read in terms of the interpretation of the said two government orders in this judgement.

e) The reference of ***Nirmaledu*** (*supra*) is answered in the negative with the qualification as provided in answers to question (a) and (d) above.

f) In respect of ***Anupam Santra*** (*supra*) and ***Chandra Bhusan Dwivedi*** (*supra*) we are of the view that the date of convocation is not relevant for the purpose of entitlement to higher scale of pay. The relevant date would be the declaration and/or publication of results and the teacher should be entitled to draw pay of post graduate teacher category in terms of **Government Order No.1595-SE(S)** dated 26th December, 2005.

g) If a teacher has partially completed higher study before entering service he/she would come under purview of **G.O. No.1595-SE(S)** dated 26th December, 2005 and the question of taking permission from DIS-SE concerned would not arise.

h) With regard to the effect of omission of Clause/Rule 12(5) of **Government Order No. 25-SE(B)/IM-102/98** dated 12th

February, 1999 in **G.O. No.46/SE(B)/1/2009** dated 27th February, 2009 we are of the view that the Government Order dated 27th February, 2009 cannot operate retrospectively and take away the benefits available under the Rule/Rules in force at that time. The said Rule cannot be given effect to invalidate benefits granted to the employees under Clause 12(5) of the Government Order dated 12th February, 1999. However, with regard to the benefits to be enjoyed under the Government Order dated 12th February, 1999 *vis-a-vis* the Government Order dated 27th February, 2009 the ratio in ***Mala Sanyal*** (*supra*) shall be followed.

273. The reference is answered accordingly.

I agree **(Soumen Sen, J.)**

(Harish Tandon, J.)

I agree

(Kausik Chanda, J.)